

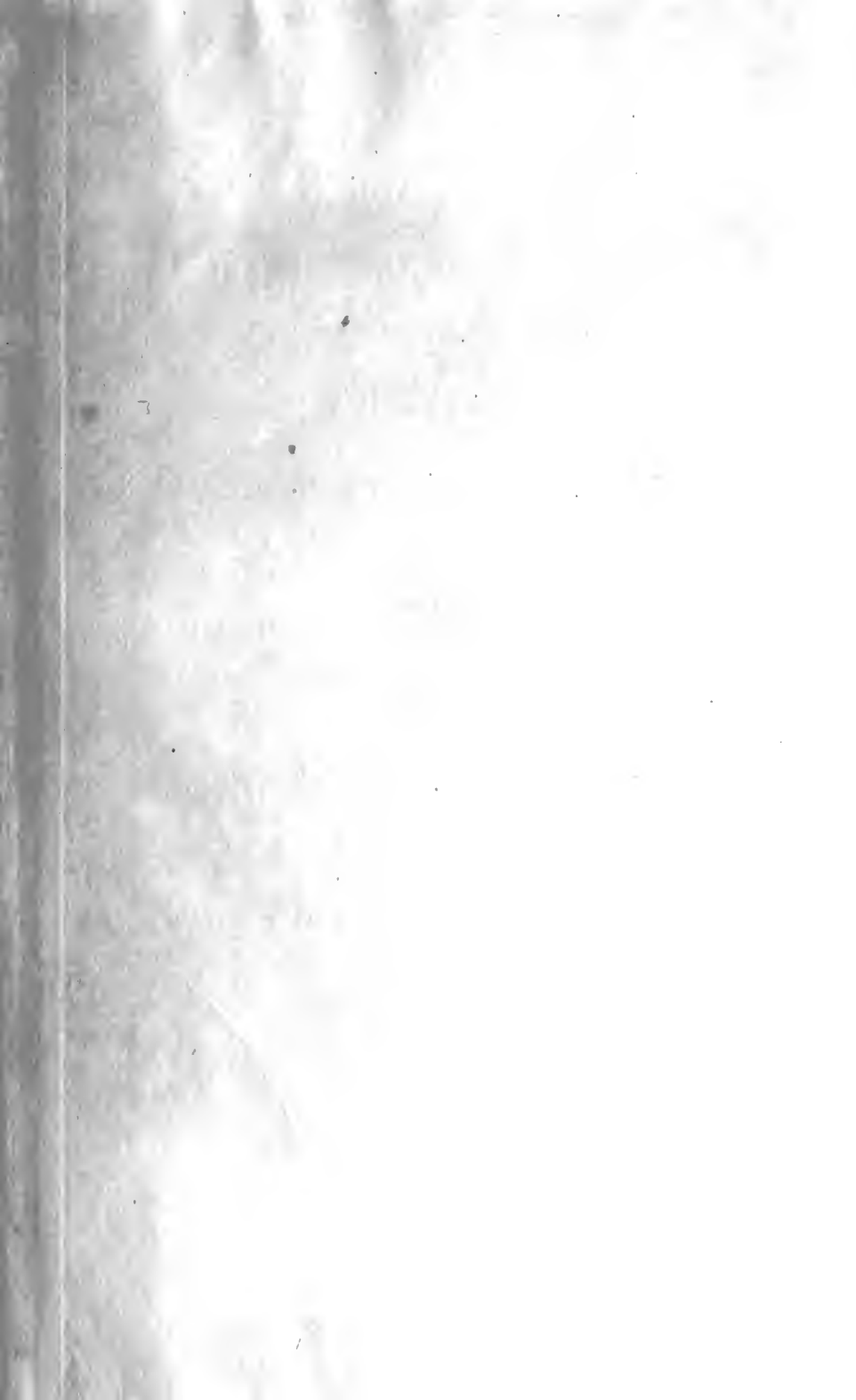
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No. 10759

United States *Vol*
Circuit Court of Appeals
For the Ninth Circuit. *2373*

CHIQUITA MINING COMPANY, LTD.,
Petitioner,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court
of the United States

FILED

JUN 1 1911

PAUL F. JOHNSON,
CLERK

S. F. L. L.
19 Books

No. 10759

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHIQUITA MINING COMPANY, LTD.,
Petitioner,

vs.

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Respondent.

Transcript of the Record

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of the United States

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

Page

Amended Petition	4
Exhibit A—Notice of Deficiency	11
Answer	21
Appearances	1
Certificate of Clerk of Tax Court	111
Decision	26
Designation of Record	108
Docket Entries	1
Memorandum Opinion	23
Motion to Reopen Cause, with Affidavits At- tached	27
Notice of Filing Petition for Review	41
Opinion, Memorandum	23
Petition, Amended	4
Exhibit A—Notice of Deficiency	11
Petition for Review	33
Notice of Filing	41

Statement of Evidence	42
Opening Statement on Behalf of Petitioner	56
Statement of Case on Behalf of Respondent	57
Witnesses for Petitioner:	
Maxfield, James	
—direct	75
Smith, James J.	
—direct	65
—redirect	69
Steffes, A. P. G.	
—direct	71
—recalled, direct	87
Wilton, Hugh	
—direct	81
Stipulation and Agreement to Statement of Evidence	107

APPEARANCES:

For Taxpayer:

MARK J. SANDRICH, C. P. A.
KENNETH W. KEARNEY, ESQ.,
A. P. G. STEFFES, ESQ.

For Comm'r:

E. A. TONJES, ESQ.,
R. C. WHITLEY, ESQ.

Docket No. 108263

CHIQUITA MINING COMPANY, LTD.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DOCKET ENTRIES

1941

July 29—Petition received and filed. (1) Telegram. (Fee not paid).

Aug. 19—Fee paid (check).

Aug. 19—Request for hearing in Los Angeles filed by taxpayer.

8-19-41 Copy served.

Aug. 19—Amended petition filed. 8-19-41 Copy served.

Sept. 25—Answer filed by General Counsel.

1941.

Sept. 29—Notice issued placing proceeding on Los Angeles calendar.

Service of answer made.

1942

Aug. 26—Hearing set Oct 12, 1942, Los Angeles.

Oct. 14—Hearing had before Mr. Arundell on the merits. Submitted.

15—(Entry of appearance of A.P.G. Steffes pending admission to practice filed).

Application for subpoena of Hugh Wilton and James Maxfield filed. Briefs due simultaneous Nov. 14, 1942. 10-14-42 Subpoenas (2) issued and served.

Nov. 7—Transcript of hearing 10-14-42 filed.

Nov. 7—Transcript of hearing 10-15-42 filed.

Nov. 12—Memorandum filed by General Counsel.
Served 11-16-42.

Nov. 16—Brief filed by taxpayer.

Nov. 16—Notice of appearance of Kenneth W. Kearney as associate counsel filed.

Nov. 16—Copy of brief served on General Counsel.
1943

Jan. 5—Memorandum opinion rendered, Arundell, Judge, Div. 7. Decision will be entered under Rule 50. 1-6-43 Copy served.

Feb. 4—Motion to re-open cause for the presentation of further evidence filed by taxpayer. (Affidavit attached). 2-6-43 Denied.

Mar. 3—Computation of deficiency filed by General Counsel.

1943

Mar. 5—Hearing set April 7, 1943 on settlement.

Apr. 7—Hearing had before Judge Murdock on settlement under Rule 50. Respondent's computation not contested. Referred to Judge Arundell for decision.

Apr. 8—Decision entered, Arundell, Judge, Div. 7.

July 6—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

July 27—Proof of service filed by taxpayer. [1*]

Aug. 16—Motion for extension to file praecipe and to lodge statement of evidence to Sept. 15, 1943 and to transmit the record to Oct. 15, 1943 filed by taxpayer.

Sept. 20—Certified copy of order from the 9th Circuit extending the time to Nov. 1, 1943 to file the designation of record and to lodge the statement of evidence, and within which to complete and transmit the record filed.

Nov. 3—Certified copy of order from the 9th Circuit extending the time to Dec. 15, 1943 to file the designation of record and to lodge the statement of evidence and within which to complete and transmit the record filed.

Dec. 9—Certified copy of an order from 9th Circuit enlarging time to Jan. 15, 1944 to prepare and transmit the record filed.

*Page numbering appearing at top of page of original certified Transcript of Record.

1944

- Jan. 4—Notice of appearance of A. P. G. Steffes as counsel filed.
- Jan. 24—Certified copy of an order from 9th Circuit extending the time to 2-15-44 to file designation of record and to lodge statement of evidence filed.
- Feb. 21—Certified copy of an order from 9th Circuit extending the time to 3-25-44 to file designation of record and to lodge statement of evidence filed.
- Mar. 28—Certified copy of an order from 9th Circuit extending time to 5-1-44 to prepare and transmit the record filed.
- Apr. 13—Statement of evidence filed by taxpayer and agreed to.
- Apr. 13—Designation of record filed by taxpayer and agreed to. [2]

United States Board of Tax Appeals

Docket No. 108263

CHIQUITA MINING COMPANY, LTD.,

Petitioner,

v.

THE COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION (amended)

The above-named petitioner hereby petitions for

a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency LA:IT:90D:PB dated May 1, 1941, and as a basis of its proceeding alleges as follows:

1. The petitioner is a corporation, organized and existing under the laws of the State of Nevada, with principal office at Goodsprings, Nevada. The returns for the period here involved were filed with the collector for the State of Nevada.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner under date of May 1, 1941.

3. The taxes in controversy are income and excess profits taxes for the calendar years 1936, 1937, 1938 and 1939 and in the total amount of Eleven Thousand, Eight Hundred Sixty-one Dollars and Sixty-five Cents (\$11,861.65).

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

Commissioner erred in his computation of cost of mining property upon which depletion is allowable.

Commissioner erred in his estimate of the useful life of machinery and equipment, upon which depreciation deduction is based.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

A. Commissioner allowed as the total cost of mining property and development, for the purpose of establishing a depletion rate, the total amount of One Hundred Thousand Four Hundred Four Dol-

lars and Fifty-two Cents (\$100,404.52) consisting of an amount allowed by Commissioner as cost of the property, Seventeen Thousand Six Hundred Ninety Dollars (\$17,690.00) plus the amount expended as capitalized cost of development expense to July 27, 1936, Eighty-two Thousand Seven [3] Hundred Fourteen Dollars and Fifty-two Cents (\$82,714.52) which would produce, upon the estimated total developed and probable ore in the property as at July 27, 1936, amounting to One Hundred Fifty Thousand (150,000) tons, a cost per ton of Sixty-six and Ninety-four hundredths cents (\$.6694) per ton, which alleged cost per ton Commissioner used as a cost depletion rate per ton.

B. Commissioner disallowed as part of the cost of the mining property, the sum of Five Hundred Thousand Dollars (\$500,000.00), said sum being the total par value, at one Dollar (\$1.00) per share, of Five Hundred Thousand (500,000) shares of Petitioner's capital stock issued in exchange for part of said property, said disallowance being made under Commissioner's erroneous assumption that all of said stock was issued to the vendors of said part of said property, Jack H. Smith and Otto F. Schwartz, and that by virtue of said issuance of said stock, the vendors of said part of said property were, immediately after such issuance of said stock, just as much in control of Petitioner's affairs as they had been in control of said part of said property prior to the transfer by said vendors of said part of said property to Petitioner.

C. Petitioner did not issue Five Hundred Thousand (500,000) shares of its stock to the vendors mentioned under subparagraph B in exchange for mining property.

D. In connection with the acquisition, by Petitioner, of mining properties, agreements were entered into between Petitioner, Chiquita Mine Syndicate, Jack H. Smith and Otto F. Schwartz under the terms of which Petitioner was to acquire, from said Jack H. Smith and Otto F. Schwartz, certain mining claims, as follows:

Gold Trail

Gold Trail Extension

Hilltop

Fritz

Gold Bank

Gold Bank #1

Eagle

Hawk

Canary

Sparrow

Quail

Dove

together with a bond and lease on Chiquita mining claim and Hillside mining claim, in consideration for which [4] acquisition, Petitioner was to issue Two Hundred Fifty Thousand (250,000) shares of its authorized capital stock to said Jack H. Smith and Otto F. Schwartz, and Two Hundred Fifty Thousand (250,000) shares of its authorized capital stock to said Chiquita Mine Syndicate, totalling

Five Hundred Thousand (500,000) shares, said stock to be deposited in escrow, and to be released from said escrow at the rate of one (1) share of said stock to Chiquita Mine Syndicate for each two (2) shares of authorized but unissued capital stock which said Chiquita Mine Syndicate should purchase from Petitioner until such time as said Chiquita Mine Syndicate should have purchased Two Hundred Fifty Thousand (250,000) of said authorized but unissued capital stock from Petitioner, after which time there should also be released to said Jack H. Smith and Otto F. Schwartz one (1) share of said stock for each two (2) shares of said authorized but unissued capital stock which said Chiquita Mine Syndicate should purchase from Petitioner. Said Jack H. Smith and Otto F. Schwartz further agreed to sell their stock exclusively through said Chiquita Mine Syndicate until such time as said Chiquita Mine Syndicate should have purchased from Petitioner all its authorized but unissued capital stock, viz. Five Hundred Thousand (500,000) shares, at which time the said escrow was to terminate.

E. The terms of the agreement set forth under sub-paragraph D hereof were substantially complied with, and at no time after the acquisition, by Petitioner, of the mining claims set forth under sub-paragraph D hereof, were the vendors thereof, said Jack H. Smith and Otto F. Schwartz, as much in control of Petitioner's affairs as they had been in control of the claims and bond and lease prior to said acquisition.

F. Due to the fact that at no time after the acquisition, by Petitioner, of property set forth under sub-paragraph D hereof, and the issuance, by Petitioner, of Two Hundred Fifty Thousand (250,000) shares of its capital stock to vendors of said property, Jack H. Smith and Otto F. Schwartz and Two Hundred Fifty Thousand (250,000) shares of its capital stock to Chiquita Mine Syndicate, were the said vendors, Jack H. Smith and Otto F. Schwartz in as much control of Petitioner's affairs as they had been in control of the claims and bond and lease prior to said acquisition of property and issuance of capital stock, the transactions in connection therewith do not constitute a non-taxable transfer, and the cost to Petitioner is not necessarily the same as the cost in the hands of [5] the vendors, Jack H. Smith and Otto F. Schwartz.

G. The cost to Petitioner of the property as set forth under sub-paragraph D amounted to not less than One Hundred Thousand Dollars (\$100,000.00).

H. The basis upon which the per ton rate of allowance for depletion should be computed is the sum of the cost to Petitioner of the property set forth under sub-paragraph D, One Hundred Thousand Dollars (\$100,000.00), plus the cost to Petitioner of development expense to July 27, 1936, Eighty-two Thousand Seven Hundred Fourteen Dollars and Fifty-two Cents, \$82,714.52.) totalling the sum of One Hundred Eighty-two Thousand, Seven Hundred Fourteen Dollars and Fifty-two Cents (\$182,714.52).

I. The per ton rate of depletion allowance should equal the result of dividing the basis set forth under sub-paragraph H, One Hundred Eighty-two Thousand Seven Hundred Fourteen Dollars and Fifty-two Cents (\$182,714.52) by the number of tons of estimated total developed and probable ore in the property as at July 27, 1936, One Hundred Fifty Thousand (150,000) tons, or the amount of One Dollar Twenty-one and Eighty-one hundredths Cents (\$1.2181) per ton.

J. Commissioner disallowed the use by Petitioner of a depreciation rate of twenty percent (20%) per year on the cost of machinery and equipment, and substituted therefor a depreciation rate of ten percent (10%) per year.

K. A depreciation allowance on machinery and equipment is intended to enable a taxpayer to recover the cost of said machinery and equipment over its useful life. Depreciation actually sustained by Petitioner on its machinery and equipment has equalled an amount equal to not less than twenty percent (20%) per year of the cost thereof.

Wherefore, the Petitioner prays that this Board may hear the proceeding and redetermine the alleged deficiency in Petitioner's Income and Excess Profits Taxes for the calendar years 1936, 1937, 1938 and 1939.

MARK J. SANDRICH, C.P.A.

Counsel for Petitioner

257 South Spring Street

Los Angeles, California [6]

State of Nevada,
County of Clark—ss.

James J. Smith, being duly sworn, says that he is the President of Petitioner corporation, and that he is duly authorized, as President thereof, to sign the foregoing Petition; that he has read the foregoing Petition, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true.

JAMES J. SMITH,
President, Chiquita Mining
Company, Ltd.

Subscribed and sworn to before me this 14th day of August, 1941.

[Seal] A. MUNZEBROCK,
Notary Public in and for the County of Clark, State
of Nevada.

My Commission Expires March 4, 1945. [7]

EXHIBIT A

May 1, 1941

LA:IT:90D:PB

Chiquita Mining Company, Ltd.,
Goodsprings, Nevada.

Sirs:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1936 and December 31, 1938 discloses a deficiency of \$9,084.99 and that the determina-

tion of your excess-profits tax liability for the taxable year ended December 31, 1938 discloses a deficiency of \$3,266.97 and that the determination of your income tax liability for the taxable year ended December 31, 1937 discloses an over-assessment of \$490.31 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:Conf. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the

form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,

Commissioner.

By

(Signed) GEORGE D. MARTIN

Internal Revenue Agent in
Charge.

Enclosures:

Statement.

Form of Waiver and acceptance.

Form 843.

PB:EES [8]

STATEMENT

LA:IT:90D:PB

Chiquita Mining Company, Ltd.,
Goodsprings, Nevada

Tax Liability for the Taxable Years Ended

December 31, 1936,

December 31, 1937

and

December 31, 1938

Year	Liability	Assessed Income Tax	Overassessment	Deficiency
1936	\$ 7,946.25	\$ 4,160.41	\$	\$ 3,785.84
1937	9.17	499.48	490.31	
1938	11,130.47	5,831.32		5,299.15
Totals	\$19,085.89	\$10,491.21	\$ 490.31	\$ 9,084.99
Excess-profits Tax				
1938	\$ 3,727.01	\$ 460.04	\$	\$ 3,266.97

In making this determination of your income and excess-profits tax liability, careful consideration has

been given to the reports of examination dated October 30, 1940 and April 1, 1941, and to your protest dated December 18, 1940.

The contention made in your protest that the determination of allowable depreciation on machinery and equipment should be based upon an estimated life of 5 years is denied, inasmuch as it is considered that the useful life of such assets in your business is 10 years. The disallowance of depreciation herein is based upon the determination of allowable depreciation on machinery and equipment at the rate of 10% per annum on the costs claimed, an allowance for one-half year being made with respect to additions to the asset during the respective years.

The contention made in your protest that percentage depletion is allowable as claimed in your amended returns for the years 1936 and 1937 and in your return for the year 1938 is denied because in your first return filed in respect of the property you did not state [9] whether you elected to have the depletion allowance for the property for the taxable year for which the return was made computed with or without regard to percentage depletion. Section 114(b)(4), Revenue Acts of 1936 and 1938. Depletion based upon cost is herein allowed under the provisions of section 23(m), Revenue Acts of 1936 and 1938.

The overassessment shown herein will be made the subject of a certificate of overassessment which will reach you in due course through the office of the collector of internal revenue for your district,

and will be applied by that official in accordance with section 322, Revenue Act of 1936, provided that you fully protect yourself against the running of the statute of limitations with respect to the apparent overassessment referred to in this letter, by filing with the collector of internal revenue for your district, a claim for refund on form 843, a copy of which is enclosed, the basis of which may be as set forth herein.

A copy of this letter and statement has been mailed to your representative, Mr. Mark J. Sandrich, 257 South Spring Street, Los Angeles, California, in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1936

Net income as disclosed by return.....	\$	0.00
Additional income and unallowable deductions:		
(a) Net income reported in amended return	\$16,698.10	
(b) Excessive depreciation claimed in amended return	2,999.02	
(c) Adjustment of depletion claimed in amended return	8,651.90	28,349.02
Total		\$28,349.02
Additional deduction:		
(d) Understatement of capital stock tax accrual in amended return		29.00
Net income adjusted	\$28,320.02	

[10]

Explanation of Adjustments

(a) Your original return reported net income as "None". The net income reported in your amended return is accepted as the correct net income subject to adjustments (b), (c) and (d).

(b) Upon the basis previously stated excessive depreciation on machinery and equipment claimed in your amended return is disallowed in the amount of \$2,999.02.

(c) For the reason previously stated percentage depletion claimed in your amended return in the amount of \$16,100.84 is disallowed. Cost depletion sustained is allowed at the rate of \$0.6694 per ton for 11,127.78 tons of ore produced, or \$7,448.94. These adjustments result in a disallowance of the net amount of \$8,651.90.

(d) The amount of capital stock tax accrued during the taxable year is \$1,029.00, whereas the deduction claimed in your amended return is \$1,000.00.

COMPUTATION OF TAX

Taxable Year Ended December 31, 1936

INCOME TAX

Normal Tax

Taxable net income	\$28,320.02
Normal-tax net income	\$28,320.02

Normal tax:

8% of \$ 2,000.00.....	\$ 160.00
11% of 13,000.00.....	1,430.00
13% of 13,320.02.....	1,731.60

Total normal tax	\$ 3,321.60
------------------------	-------------

Surtax on Undistributed Profits

Taxable net income	\$28,320.02
Less: Normal tax	3,321.60

Adjusted net income	\$24,998.42
Undistributed net income	\$24,998.42

Surtax:

7% of \$5,000.00.....	\$ 350.00
12% of 2,499.84.....	299.98
17% of 4,999.68.....	849.95
22% of 4,999.68.....	1,099.93
27% of 7,499.22.....	2,024.79

Total surtax	\$ 4,624.65
Total normal tax	3,321.60

Total income tax (normal tax and surtax).....	\$ 7,946.25
---	-------------

Income tax assessed (normal tax and surtax):

Original, account No. 85069.....\$ None

Amended return, account No. Feb.

40000 (1939) 4,160.41

Total assessed	4,160.41
----------------------	----------

Deficiency of income tax.....	\$ 3,785.84
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[12]

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1937

Net income as disclosed by return.....	\$ 0.00
--	---------

Additional income and unallowable deductions:

(a) Net income reported in amended return	\$ 3,222.72	
(b) Excessive depreciation claimed in amended return	10,493.67	
(c) Overstatement of capital stock tax accrued in amended return.....	750.00	
(d) Deduction of penalty in amended return disallowed	148.50	14,614.89

Total	\$14,614.89
-------------	-------------

Additional deduction:

(e) Adjustment of depletion claimed in amended return	14,551.39
---	-----------

Net income adjusted	\$ 63.50
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Explanation of Adjustments

(a) Your original return reported net income as "None". The net income reported in your amended return is accepted as the correct net income subject to adjustments (b), (c), (d) and (e).

(b) Upon the basis previously stated excessive depreciation on machinery and equipment claimed in your amended return is disallowed in the amount of \$10,493.67.

(c) The amount of capital stock tax accrued during the taxable year is \$250.00, whereas the deduction claimed in your amended return is \$1,000.00.

(d) The deduction of \$148.50 claimed in your amended return for penalty incurred due to delinquency in filing capital stock tax return is not allowable: section 23(a), Revenue Act of 1936. [13]

(e) For the reason previously stated percentage depletion claimed in your amended return in the amount of \$3,441.15 is disallowed. Cost depletion sustained is allowed at the rate of \$0.6694 per ton for 26,878.61 tons of ore produced, or \$17,992.54. These adjustments result in an additional deduction in the net amount of \$14,551.39.

COMPUTATION TAX

Taxable Year Ended December 31, 1937

INCOME TAX

Normal Tax

Taxable net income	\$	63.50
Normal-tax net income	\$	63.50
Normal tax:		
8% of \$63.50	\$	5.08
Total normal tax	\$	5.08

Surtax on Undistributed Profits

Taxable net income	\$	63.50
Less: Normal tax		5.08
Adjusted net income	\$	58.42
Undistributed net income	\$	58.42

Surtax:

7% of \$58.42	\$	4.09
Total surtax	\$	4.09
Total normal tax		5.08

Total income tax (normal tax and surtax).....\$ 9.17

Income tax assessed (Normal tax and surtax):

Original, account No. 85561.....	\$	None
Amended return, account No. Feb.		
40001 (1939)		499.48

Total assessed | 499.48 |

Overassessment of income tax.....\$ 490.31

[14]

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1938

Net income as disclosed by return.....\$32,667.29

Unallowable deductions:

(a) Excessive depreciation	\$11,623.10	
(b) Adjustment of depletion	18,243.03	
(c) Penalty	25.00	29,891.13

Total\$62,558.42

Additional deduction:

(d) Capital stock tax 250.00

Net income adjusted \$62,308.42

Explanation of Adjustments

(a) Upon the basis previously stated excessive depreciation on machinery and equipment claimed in your return is disallowed in the amount of \$11,623.10.

(b) For the reason previously stated percentage depletion claimed in your return in the amount of \$32,828.43 is disallowed. Cost depletion is allowed at the rate of \$0.6694 per ton for 21,788.76 tons of ore produced, or \$14,585.40. These adjustments result in a disallowance of the net amount of \$18,243.03.

(c) The deduction of \$25.00 claimed in your return for penalty incurred due to delinquency in filing capital stock tax return is not allowable; section 23(a), Revenue Act of 1938.

(d) The amount of capital stock tax accrued during the taxable year is \$500.00, whereas the deduction claimed in your return is \$250.00. [15]

COMPUTATION OF TAX

Taxable Year Ended December 31, 1938

EXCESS-PROFITS TAX

Taxable net income \$62,308.42

Less: 10% of \$250,000.00, value of capital stock as declared in your capital stock tax return for year ended June 30, 1938 25,000.00

Net income subject to excess-profits tax..... \$37,308.42

5% of declared value of capital stock..... 12,500.00

Balance \$24,808.42

Excess-profits tax:

6% of \$12,500.00.....\$ 750.00

12% of \$24,808.42..... 2,977.01

Correct excess-profits tax liability.....\$ 3,727.01

Excess-profits tax assessed:

Original, account No. 40236..... 460.04

Deficiency of excess-profits tax\$ 3,266.97

INCOME TAX

Taxable net income\$62,308.42

Less: Excess-profits tax 3,727.01

Adjusted net income\$58,581.41

Tentative tax at 19%\$11,130.47

Correct income tax liability\$11,130.47

Income tax assessed:

Original, account No. 40236..... 5,831.32

Deficiency of income tax\$ 5,299.15

[Stamped]: Amended Petition. Appeal Filed
7-29-41.[Endorsed]: U.S.B.T.A. Filed Aug. 19, 1941.
[16]

[Title of Board and Cause.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1 and 2. Admits the allegations contained in paragraphs 1 and 2 of the petition.

3. Admits that the taxes in controversy are income and excess-profits taxes for the calendar years 1936, 1937, and 1938; denies the remainder of the allegations contained in paragraph 3 of the petition.

4. Denies the allegations of error contained in paragraph 4 of the petition.

5. A. Admits that the Commissioner allowed as the total cost of mining property and development, for the purpose of determining a depletion rate, an amount of \$100,404.52 consisting [17] of an amount allowed as cost of the property in the amount of \$17,690.00, plus the amount expended as capitalized cost of development to June 27, 1936, in the amount of \$82,714.52. Admits that the Commissioner determined that the taxpayer may deduct depletion on the basis of \$.6694 per ton. Denies the remainder of the allegations contained in subparagraph A of paragraph 5 of the petition.

B to K, inclusive. Denies the allegations contained in subparagraphs B to K, inclusive, of paragraph 5 of the petition.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

(Signed) J. P. WENCHEL,

FTH

Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

Alva C. Baird,

Division Counsel.

Frank T. Horner,

E. A. Tonjes,

Special Attorneys,

Bureau of Internal Revenue.

FAT/mm 9/18/41

[Endorsed]: U.S.B.T.A. Filed Sept. 25, 1941.

[18]

The Tax Court of the United States

[Title of Cause.]

Docket No. 108263

Depreciation of mining and milling machinery and equipment determined.

N. J. Sandrich, C.P.A.,
for the petitioner.

E. A. Tonjes, Esq.,
for the respondent.

MEMORANDUM OPINION

Arundell, Judge: Deficiencies in income taxes have been determined for the years 1936 and 1938 in the

respective amounts of \$3,785.84. \$5,299.15 and for the year 1938 there was also determined a deficiency in excess profits taxes in the sum of \$3,266.97. Two issues are raised by [19] the pleadings: (1) the proper allowance for depletion and (2) the allowable depreciation. No evidence was offered on the first issue and respondent's determination on this point is consequently approved.

The parties have agreed on the cost of the depreciable machinery and equipment here in dispute, leaving only the useful life of that property for determination. The respondent based his determination on a finding that the property had a 10-year life, while petitioner claims that the useful life was not more than five years.

Petitioner was organized under the laws of Nevada with its principal office at Goodsprings, Nevada and its returns for the taxable years were filed with the Collector for the State of Nevada.

It commenced the operation of its plant on a revenue producing basis in August 1936. Operations were continued until July 1941, at which time all operations ceased because of the disappearance of commercial ore that it would pay to mine and mill. The cost of mining and milling machinery up to the time when petitioner commenced operations in 1936 was \$101,703.30; additions in 1937 cost \$15,849.61; additions in 1938 cost \$6,424.06; and in 1939 there was expended in additions \$5,910.51, making a total cost of \$129,887.48. These amounts were agreed to by the parties.

A large part of the equipment here involved was bought as a unit from an old mining camp near Tonopah, Nevada. The plant so purchased was dismantled and moved to its present location, where after being overhauled and new parts used to replace old parts, where necessary, it was finally installed. The old mill had been set up and torn down many times before it was acquired by petitioner. It was petitioner's purpose to use the [20] mill so constructed as a test mill to determine the best method of treating the ore and it was not contemplated at the time of its erection that it could be used many years. The reason for this fact was that the ores initially being treated were an oxide and after their exhaustion the ores expected to be encountered were a sulphide, which ores required an entirely different process and mill for their treatment. None of the large or important items constituting the plant was new and the life of this machinery and equipment was not more than one-half that of new machinery and equipment. The cost of moving the old plant to its present location and reconditioning it was high and it turned out that it would have been more economical to have purchased much of the machinery new.

When the mine closed the general condition of the equipment was very poor, and one of the two ball mills had already been completely abandoned. The capacity of the mill was more than cut in two at this time and it would have cost from \$20,000 to \$25,000 to put it in operating condition, and even after this expenditure it would have been only about seventy

per cent efficient. When the mine closed there was no further use for the machinery and equipment and the salvage value of the plant at that time was approximately \$13,000. The milling and mining machinery was not of a type, nor of a capacity, that would be suitable for the mining and milling of the sulphide ore, which had then been encountered in its operations.

Considering the entire evidence, we are of the opinion that depreciation on the property involved should be allowed on the basis of a five-year life.

Decision will be entered under Rule 50.

Enter:

Entered Jan. 5, 1943. [21]

The Tax Court of the United States
Washington

Docket No. 108263

CHIQUITA MINING COMPANY, LTD.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the memorandum opinion of the Court entered herein on January 5, 1943, the respondent herein, on March 3, 1943, filed a recomputation for entry of decision under Rule 50. Hear-

ing was had thereon on April 7, 1943, at which time the recomputation filed by the respondent was not contested by the petitioner. Wherefore, it is

Ordered and Decided: That there are deficiencies in income tax for the years 1936 and 1938 in the respective amounts of \$2,131.29 and \$3,279.96 and that there is a deficiency in excess profits tax for the year 1938 in the amount of \$1,817.79.

Enter:

Entered April 8, 1943.

(Signed) C. R. ARUNDELL,
Judge. [22]

[Title of Tax Court and Cause.]

MOTION TO RE-OPEN CAUSE

Chiquita Mining Company, Ltd., a Nevada corporation, petitioner herein, moves this Honorable Court to reopen the cause heretofore tried on the 14th and 15th days of October, 1942 for the presentation of further evidence upon the issue of the allowance of a proper rate for depletion of the ores in the properties owned by petitioner;

Said motion is made in the interest of justice and will be made upon the ground that by reason of surprise, misfortune, and excusable neglect petitioner was prevented from being heard upon the issue above mentioned;

Said motion is based upon all the records and files herein, upon the transcript of proceedings be-

fore this Honorable Court and upon the affidavits of A.P.G. Steffes, Mark J. Sandrich and Benton N. Colver, served and filed herewith.

MARK J. SANDRICH, C.P.A.

Counsel for Petitioner,
257 S. Spring St.,
Los Angeles, California.

KENNETH W. KEARNEY,

215 W. Seventh St.,
Los Angeles, Calif.
Of Counsel. [23]

AFFIDAVIT

State of California

County of Los Angeles—ss.

A. P. G. Steffes, being first duly sworn, deposes and says:

That on the 14th day of October, 1942, by permission therefor duly given, affiant appeared as counsel for Chiquita Mining Company, Ltd., before the Board of Tax Appeals, and likewise appeared in the same matter on the 15th day of October, 1942, as is more particularly shown by the records of said hearing.

That immediately prior to and at the time of said hearing, affiant was ill as the result of overwork; that immediately after the conclusion of said hearing, affiant went to his home and suffered a physical and nervous collapse.

That the following Monday morning affiant attempted to carry on certain court work, but after doing so, suffered another collapse.

That affiant suffered a third collapse on Monday, October 26, 1942, and was confined to his bed during that entire week and until his removal to the United States Veteran's Hospital at Sawtelle, California, on Saturday, October 31, 1942.

That affiant remained in said hospital for a period of two weeks, leaving said hospital on Saturday, November 14, 1942.

That for some time thereafter affiant was unable to carry on any work as an attorney at law, or otherwise.

That affiant verily believes that because of his physical, mental and nervous condition immediately prior to and at the time [24] of the said hearing he was unable to properly prepare and present said matter in the manner in which he would have presented the same had he not been ill.

A. P. G. STEFFES.

Subscribed and sworn to before me this 1st day of February, 1943.

[Seal] OLGA L. RUPP,

Notary Public, Los Angeles County, State of California. [25]

State of California,
County of Los Angeles—ss.

Benton N. Colver, being duly sworn deposes and says that he is a physician and surgeon, duly licensed to practise as such in the State of California; that he has known Mr. A. P. G. Steffes for seven years; that on October 16, 1942, Mr. Steffes called upon affiant for treatment; that Mr. Steffes

was then suffering from acute exacerbation of chronic nasal infection and resulting nervous depletion, and was not in affiant's opinion able to transact any business nor handle the trial of a case in court; that it appeared to affiant that Mr. Steffes has been seriously ill for a considerable length of time; that affiant recommended the following treatment for Mr. Steffes: nasal treatments, phototherapy, controlled dietetic regime, and complete rest; that Mr. Steffes was under the treatment of affiant and other physicians for several weeks, a large part of the time being confined to a hospital, and has now, affiant is informed and believes, recovered sufficiently to return to business.

BENTON N. COLVER.

Subscribed and sworn to before me this 1st day of Feb., 1943.

MARY PATCH,

Notary Public in and for the County of Los Angeles, State of California. [26]

AFFIDAVIT

State of California

County of Los Angeles—ss.

Mark J. Sandrich, being first duly sworn, deposes and says: That he is a certified public accountant; that, as counsel for Chiquita Mining Company, Ltd., a Nevada corporation, he instituted in its behalf a petition before the United States Board of Tax

Appeals for redetermination of income tax liability, which petition was assigned Docket number 108263, and which came on for hearing in Los Angeles, California, on the 14th and 15th days of October, 1942, before the Honorable C. R. Arundell;

That affiant had arranged with one A. P. G. Steffes, who is general counsel for petitioner, a member of the bars of the States of California and Nevada, to associate himself as co-counsel in the matter, and to procure and produce, at the hearing, certain documentary evidence necessary to the successful presentation of the case; That said A. P. G. Steffes assured affiant that he was familiar with the transactions involved and that at the time for trial, he, the said A. P. G. Steffes, would appear, and would produce said documentary evidence; That the day before the trial, affiant spoke to the said A. P. G. Steffes and was under the impression that Mr. Steffes was ready to produce said documentary evidence;

That upon the opening of trial, it became evident to affiant that the said A. P. G. Steffes had not produced said documentary evidence, and, from affiants' conversation with Mr. [27] Steffes at that time, it became apparent that Mr. Steffes was unable, at that time, to so produce said documentary evidence; That said documentary evidence consisted of contracts and agreements, together with escrow papers and other instruments evidencing the acquisition, and manner thereof, of the mining claims acquired by petitioner, such acquisition, and man-

ner thereof, constituting the main point in the determination of whether or not the original owners of said mining claims were in control of the corporation immediately after such transfer of said mining claims to the Petitioner;

That affiant is advised, and believes, that petitioner herein has a valid and meritorious case upon the merits, with regard to the question of the allowance of a proper deduction for depletion of the ore in the Chiquita Mine;

That affiant relied upon A. P. G. Steffes to present evidence upon that issue before the Honorable Court and affiant did not know at the time of trial of this cause that Mr. Steffes was too ill to assist in the trial, or to transact any business.

That affiant believes that in the interests of justice this cause should be reopened in order that petitioner may have its day in court with regard to the issue involved and that if such rehearing is granted the evidence [28] will show that petitioner is entitled to a redetermination of the rate allowed it for depletion of the ore in the properties owned by petitioner.

MARK J. SANDRICH.

Subscribed and sworn to before me this 1st day of February, 1943.

MARY PATCH,

Notary Public in and for the County of Los Angeles, State of California.

[Stamped]: The Tax Court of the U. S. Denied Feb. 6, 1943. (Signed) C. R. Arundell, Judge.

[Endorsed]: T.C.U.S. Filed Feb. 4, 1943. [29]

[Title of Tax Court and Cause.]

PETITION FOR REVIEW BY THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

I.

JURISDICTION

Chiquita Mining Company, Ltd., your petitioner, respectfully petitions this Honorable Court to review the decision of the Tax Court of the United States, entered on April 8, 1943, and finding a deficiency in income tax due from your petitioner, for the years 1936 and 1938 in the respective amounts of \$2,131.29 and \$3,279.96; and finding a deficiency in excess profits tax due from your petitioner for the year 1938, in the amount of \$1,817.79.

Your petitioner is a corporation organized under the laws of the State of Nevada, having its principal office and place of business at Goodsprings, Nevada. [30]

The income tax and excess profits tax returns in respect of which the aforementioned tax liabilities arose were filed by your petitioner with the Collector of Internal Revenue for the District of Nevada, located in the City of Reno, State of Nevada, which is located within the jurisdiction of the Circuit Court of Appeals for the Ninth Judicial Circuit.

Jurisdiction in this court to review the decision

of the Tax Court of the United States aforesaid is founded on Sections 1001-3 of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928, 1101 of the Revenue Act of 1932, and 519 of the Revenue Act of 1934. (Sec. 1141-1142 I.R.C.)

II.

NATURE OF CONTROVERSY

Your petitioner was incorporated in 1932, and during the year for which the tax deficiencies were assessed, was engaged in the mining and production of gold in the Yellow Pine Mining District near Goodsprings, Nevada. Petitioner had an authorized capital stock of one million (1,000,000) shares, and having a par value of \$1.00.

In 1932, Petitioner acquired from Jack H. Smith and Otto F. Schwarz twelve (12) unpatented mining claims and a lease with option to purchase two (2) other mining claims. In consideration thereof petitioner issued 250,000 shares of its authorized capital stock to Jack H. Smith and Otto F. [31] Schwarz and 250,000 shares to Chiquita Mine Syndicate totaling 500,000 shares. The 250,000 shares issued to Chiquita Mine Syndicate were to be placed in escrow and released to Chiquita Mine Syndicate if, as and when there was purchased from the treasury of the corporation any or all of the remaining 500,000 shares. One (1) share of stock was to be released from escrow for each two (2) shares thus purchased from the treasury of the corporation.

None of the shares contained in the block of 250,000 shares issued to Chiquita Mine Syndicate, nor any shares contained in the block of 500,000 shares of treasury stock, were acquired by Jack H. Smith or Otto F. Schwarz, or either of them. Furthermore, Jack H. Smith and Otto F. Schwarz agreed to sell the 250,000 shares issued to them to Chiquita Mine Syndicate for the total price of \$87,500.00. This block of 250,000 shares originally issued to Jack H. Smith and Otto F. Schwarz was, over a period of time, actually purchased by Chiquita Mine Syndicate for the total consideration of \$87,500.00.

Consequently, at no time after the acquisition by petitioner of the mining claims mentioned above, were the vendors thereof, said Jack H. Smith and Otto F. Schwarz, as much in control of petitioners affairs as they had been in control of the claims prior to said acquisition.

In 1936, petitioner produced 11,127.78 tons of ore, [32] and in 1938, 21,788.76 tons.

The Commissioner allowed as the total cost of mining property and development, for the purpose of establishing a cost depletion rate, the total sum of \$100,404.52, consisting of an amount of \$17,690.00 allowed as cost of property, plus \$82,714.52 allowed as the amount expended as capitalized cost of development expense to July 27, 1936, which would produce, upon the estimated total developed and probable ore in the property as at July 27, 1936, amounting to 150,000 tons, a cost per ton of 66.94 cents (\$.6694) per ton, which alleged cost per

ton, the Commissioner used as a cost depletion rate per ton.

The Commissioner disallowed as part of the cost of the mining property, the sum of \$500,000, said sum being the total par value, at \$1.00 per share, of 500,000 shares of petitioner's capital stock issued in payment for part of said property. Said disallowance was made under the Commissioners erroneous assumption that all of said stock was issued to the vendors of said property, namely, Jack H. Smith and Otto F. Schwarz, and therefore, that immediately after the issuance of said stock and by reason thereof, the said vendors were just as much in control of petitioner's affairs and said mining property, as they had been prior to the acquisition of said property by petitioner.

Petitioner maintained that since at no time did Jack H. Smith and Otto F. Schwarz own more than one-half of the out- [33] standing shares of stock of petitioner, therefore, at no time were said vendors of said mining property in as much control of petitioner's affairs and said mining property as they had been in control of the mining property prior to its acquisition by petitioner.

Petitioner further contended that the cost to petitioner was and is not necessarily the same as the cost in the hands of said vendors, but that the cost to petitioner of said property amounted to not less than \$100,000.00.

Based upon the foregoing, petitioner contended that the basis upon which the per ton rate of allow-

ance for cost depletion should be computed, is the sum of \$500,000.00 or in any event, \$100,000.00, plus the cost to petitioner of development expense amounting to \$82,714.52, totaling the sum of \$182,714.52. Reasoning further, petitioner contended that the proper per ton rate of depletion allowance should equal the result of dividing the said sum of \$182,714.52 by 150,000 (the number of tons of estimated total developed and probable ore in the property as at July 27, 1936) or the resulting amount of \$1.2181 per ton.

Had the latter rate per ton of cost depletion been allowed, the following changes in assessments would have resulted: [34]

	Assessed by Commissioner	Proper Assessment
1936 Income Tax	\$2,131.29	\$ 142.39
1938 Income Tax	3,279.96	1,281.02
1938 Excess Profits Tax	1,817.79	383.14
	<hr/>	<hr/>
Total	\$7,229.04	\$1,806.55

In the proceedings before The Tax Court of the United States, two issues were raised by the pleadings: (1) the proper allowance for depletion and (2) the allowable depreciation.

The Tax Court of the United States held: (1) That no evidence was offered on the first issue and the Commissioner's determination on this point was approved.

(2) That, as contended by petitioner, depreciation on the personal property involved should be allowed on the basis of a five-year life as claimed

by petitioner, instead of a ten-year life as determined by the Commissioner.

* * * * *

Since the decision of the Tax Court of the United States on the depreciation issue was not adverse to the contention of petitioner, this Petition for Review is not directed to the decision on that issue. For the same reason, no facts are recited herein, bearing upon that issue.

As is more particularly set forth hereinafter, under "Assignments of Error", the Tax Court of the United States denied petitioner application for a continuance, made certain rulings with regard to the introduction of evidence, and denied petitioner's motion to re-open the cause, for the presentation [35] of further evidence upon the depletion issue.

* * * * *

III.

ASSIGNMENT OF ERRORS

In making its decision as aforesaid, The Tax Court of the United States committed the following errors upon which your petitioner relies as the basis of this proceeding:

(1) The Court erred in denying petitioner's motion for a continuance when the cause was first called on the calendar on October 12, 1942.

(2) The Court erred in holding that evidence was immaterial, to the effect that on two prior occasions the Internal Revenue Department had held that the cost to petitioner of the mining property in ques-

tion was \$500,000.00, and that upon each of said occasions, petitioner paid an additional tax based on such determination.

(3) The Court erred in denying petitioner's motion for a continuance after the refusal of James Maxfield and Hugh Wilton to testify (Mr. Maxfield being the Chiquita Mine Syndicate).

(4) Counsel for the Commissioner having agreed to the introduction of secondary evidence in lieu of certain written documents, the Court erred:

(a) In restricting the proof to such written documents;

(b) In rejecting the secondary evidence of the attorney for petitioner, concerning the consideration for said mining [36] property paid, by petitioner, and that portion of said consideration which was received by the vendors, Jack H. Smith and Otto F. Schwarz, upon the question as to whether said vendors were at any time as much in control of petitioner's affairs as they had been prior to the acquisition of said property by petitioner.

(c) In rejecting the secondary evidence of Mark J. Sandrich, C.P.A. on the same subject.

(d) In rejecting the books and records of petitioner in the possession of said Mark J. Sandrich, C.P.A. on the same subject.

(5) The Court erred in rejecting evidence on the question as to whether the Commissioner was estopped to deny the cost to petitioner of said mining claims to be \$500,000 by reason of two previous determinations to that effect by the Internal Revenue Department.

(6) The Court erred in denying petitioner's motion to reopen this cause for the presentation of further evidence upon the issue of the allowance of a proper rate for depletion of the ores in the properties owned by the petitioner.

(The evidence referred to in Assignments 4a-b-c-d and 5, *supra*, is too voluminous to quote in full as part of said Assignments of Error, but will appear in full in the statement of evidence to be filed herein.)

Wherefore, your petitioner prays that this Honorable [37] Court may review the decision and order of The Tax Court of the United States with reference to the proper allowance for depletion, and reverse and set aside the same, and direct The Tax Court of the United States to cause a rehearing and further hearing to be had on said question relating to the proper allowance for depletion; and for the entry of such further orders and directions as shall by this Court be deemed meet and proper, in accordance with law.

MARK J. SANDRICH, C.P.A.

Counsel for the Petitioner

A. P. G. STEFFES

Attorneys for Petitioner

257 So. Spring Street

Los Angeles, California.

State of California

County of Los Angeles—ss.

A. P. G. Steffes, being duly sworn, says:

I am one of the attorneys for the petitioner in this

proceeding; I prepared the foregoing petition and am familiar with the contents thereof. The allegations of fact contained therein are true to the best of my knowledge, information, and belief. The petition is not filed for the purpose of delay, and I believe the petitioner is justly entitled to the relief sought.

A. P. G. STEFFES

Subscribed and sworn to before me this 2nd day of July, 1943.

HENRY W. SHAW

Notary Public in and for said
County and State.

[Endorsed]: T.C.U.S. Filed July 6, 1943. [38]

[Title of Tax Court and Cause.]

NOTICE OF FILING PETITION FOR
REVIEW

To: Commissioner of Internal Revenue,
Internal Revenue Building,
Washington, D. C.

J. P. Wenchel, Attorney for Respondent,
Chief Counsel,
Internal Revenue Building,
Washington, D. C.

You Are Hereby Notified that on the 6th day of July, 1943, a petition for review by the United States Circuit Court of Appeals for the Ninth Cir-

cuit of the decision of The Tax Court of The United States heretofore rendered in the above entitled cause, was filed with the Clerk of said Court.

A copy of the petition as filed is attached hereto and served upon you.

Dated: July 20, 1943.

MARK J. SANDRICH, CPA

Counsel for Petitioner

A. P. G. STEFFES

Attorney for Petitioner

257 South Spring Street,

Los Angeles, California.

Service of the foregoing notice of filing and of a copy of the petition for review is hereby acknowledged this 26th day of July, 1943.

J. P. WENCHEL SLY.

Chief Counsel

Bureau of Internal Revenue

Attorney for Respondent.

[Endorsed]: T.C.U.S. Filed July 27, 1943. [39]

[Title of Tax Court and Cause.]

STATEMENT OF EVIDENCE

The above-entitled proceeding came on for hearing on the 12th day of October, 1942, before the Honorable C. E. Arundell, Judge of The Tax Court of the United States, at Los Angeles, California, pursuant to notice of hearing theretofore given.

Mark J. Sandrich, Esq., appeared on behalf of Petitioner; and E. A. Tonjes, Esq., for the Honorable J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, appeared on behalf of the Commissioner of Internal Revenue, Respondent.

Thereupon the following proceedings were had, and testimony heard, to wit: [40]

PROCEEDINGS

The Clerk: 108263, Chiquita Mining Company, Ltd.

Mr. Sandrich: Mark J. Sandrich for the petitioner.

There are some complications that have arisen here, in that my first witness, my most important witness, who is the majority stockholder and whose affairs are under bankruptcy in 77(b), and he is so involved in some other proceeding directly connected with ownership of the mine that he has been advised by his attorney that he cannot testify in this case, or, rather, that he should not, for his own reasons.

The trustee in bankruptcy, who has control of this stock is, of course, under direction of Judge Brink, and Judge Brink is not in town. Therefore, the trustee is not able to get any instructions. There are also some other matters pending there regarding the ending of the bankruptcy proceeding, and the whole affair seems to be up in the air at this time.

This witness' testimony will be of great importance.

Mr. William Rains: My name is William Rains, if the Court please, and I represent the trustee. I heard nothing of this matter until late last Friday night. I talked to the trustee, and he doesn't know whether as trustee under the bankruptcy proceedings—and, incidentally he now holds 51 per cent of the issued and outstanding stock of the petitioning corporation; and, incidentally, there was a Chapter 11 proceeding preceding the bankruptcy, in which he held title to the same amount of stock—he doesn't know whether or not in the year and a half, more or less, through either of those proceedings, either the bankruptcy, and I should have said Chapter 10 instead of Chapter 11, he may have incurred a tax liability or may not have. I doubt that he has, but there is a [41] possibility. I don't know what his position should be here, and as Mr. Sandrich has stated, the situation is confusing to the trustee and his counsel.

We have effected virtually a compromise of the entire composition of the bankruptcy proceedings, and it is a matter of days, not more than a very few weeks, before all of this stock will be turned back to the individuals and to the debtor corporation, there being sufficient cash to satisfy the Referee in Bankruptcy for creditors, and we have devised a mechanism, we hope, for the payment of counsel fees and administration expenses over and above this particular stock, which will not be invaded at all.

We would like very much, from the trustee's standpoint—we have no interest whatsoever other-

wise—to let the matter go back to the individuals and to the debtor corporation before the trustee is called upon to do anything in connection with this matter.

The Judge: Whose proceedings are in bankruptcy,—this company's?

Mr. Rains: This company's. 51 per cent of the stock of this company is owned by the trustee in bankruptcy, but all of that stock will be turned back to the individuals, who are bankrupt.

Mr. Tonjes: To the bankrupt corporation?

Mr. Rains: To the bankrupt corporation.

The Judge: Is this corporation I have before me in those proceedings?

Mr. Rains: It is not in the proceedings, not the corporation as such, no, your Honor.

Mr. A. P. G. Steffes: May I be heard as a witness? My name is A. P. G. Steffes, and I was requested to come here from Las Vegas, Nevada, [42] because I first represented the company back in 1933 when a certain decision was made by the Internal Revenue Department, and when the investigation was made by Mr. Hanson, the engineer, and by Mr. Evans, a special agent, and I don't recall the name of the auditor, Wetsel, or something of that kind. Those three gentlemen and the president of the company came into my office in Las Vegas to consult with me with reference to the history of this case since the time that I came into the representation of the company in May, 1933.

I am speaking as a witness because of the fact that since that time, up until the present time, I be-

lieve, that I have kept pace with the facts in the case, and know the facts. However, there are certain facts connected with the bankruptcy of the corporation owning 51 per cent of the stock of the Chiquita Mining Company, Ltd., which is more within the knowledge of the trustee in bankruptcy, but in the interests of justice it would by my suggestion, and I agree with Mr. Rains, that if there is a deficiency, that deficiency would have been incurred prior to the time that the present trustee became trustee in bankruptcy of the corporation holding the control of this company.

When the bankruptcy proceedings are terminated, which I understood would be within several weeks, then the control of the company would again vest in the corporation which had it before, and then that corporation would have the responsibility of meeting the situation here.

Incidentally, when these three men from the government making the investigation came to my office, it took about three or four hours, I believe, for our conference concerning the past and the present at that time of the situation surrounding the deficiency levied here.

Now, there is another reason why, in the interests of justice, a [43] continuance should be granted. Very recently, well, within or since Pearl Harbor, gold mining has gradually decreased. Now it is practically impossible, particularly in the State of Nevada, where I practice, as well as here, to operate a gold mine. It will be necessary, in the event that a tax deficiency should be paid, since the mine can-

not be operated, that certain equipment be sold. That equipment can best be sold to certain companies engaged in defense work, and an amount realized from the sale so that the deficiency can be paid.

The matter is most complicated and involves a period of over nine years, and involves the legal effect, to a great extent, and I would say primarily, of two prior decisions of the Internal Revenue Department, as to the purchase price or the value of the mine at the time it was acquired by the Chiquita Mining Company, Ltd. At first blush it might appear that this is a simple matter, but I might say that prior to our concluding our conference, Mr. Evans, the special agent, voluntarily made the remark that the first and second findings of the Internal Revenue Department should be placed in the record, and that might be gone into.

The Judge: May I interrupt you a minute?

Mr. Steffes: Yes.

The Judge: What is your name?

Mr. Steffes: Steffes, S-t-e-f-f-e-s.

The Judge: What is your connection with the case? I don't see that your name is entered as counsel.

Mr. Steffes: I stated that I was appearing as a witness.

The Judge: We don't have any appearances as witnesses to control in the case. You are either counsel for the company or you are not.

Mr. Steffes: Well, I was asked to appear. [44]

The Judge: By whom?

Mr. Steffes: I was asked to appear by Mr. Sandrich and by the parties who will be primarily interested when the case—that is, when the ownership of the control of this mine vests back in the corporation which is now in bankruptcy, and when I stated my name I believe I did state that I was appearing as a witness. I wouldn't have stated what I have stated unless I had assumed that I would be permitted to make such a statement because of my knowledge of the facts, and because of the fact that the Government men came to see me to discuss with me my knowledge of the facts over that period of nine years.

The Judge: Is Mr. Sandrich in the court room?

Mr. Sandrich: I am Mr. Sandrich.

Mr. Steffes: Mr. Sandrich is present.

Mr. Tonjes: Your Honor, we would like to have the record show that the respondent is ready and willing to proceed.

The Judge: What I don't understand about this matter is simply this: This case is here by the initiation of the proceedings by the corporation, and you appeared as counsel, and the question involved has to do essentially with the depreciation of certain equipment.

Mr. Sandrich: May I amend that, your Honor, to say that the depreciation is important, but more important, and of practically the biggest part of the whole case is the depletion, and which bears upon the value to the corporation, the cost to the corporation, and the date when the physical properties were acquired, and as to whether or not the original

owners thereof were in control of the corporation immediately after such acquisition.

The Judge: Yes, but what I don't understand is what difference [45] it makes as to who happens to be the stockholder of record of certain shares of this company.

Mr. Sandrich: The point is my principal witness, the most important witness, the one that has the most intimate and complete knowledge of the whole thing happens to own a little over 51 per cent of the capital stock of the Chiquita Mining Company, Ltd., and his affairs and the affairs of some corporations in which he is interested are in bankruptcy.

He also has some other affairs pending before the Federal Courts, and he has been advised by his attorney that he should not testify in this matter at this time, because his affairs are in a state of flux. The bankruptcy is expected to terminate, the proceedings, in which case his properties go back to him.

I don't clearly understand all of the reasons myself, your Honor, except that I am left here without my most important witness.

Mr. Tonjes: Your Honor please, it might be pertinent here to inquire the name of the man who owns the 51 per cent. We have heard a lot of talk about some man or some person owning it.

Mr. Steffes: Maxfield Wilton and Associates, Inc., a corporation. That is a Nevada corporation which owns the stock approximately amounting to 51 per cent. I think it is 500,584 shares out of 1,000,000. The individual who controls that corporation

and likewise owns a considerable block of stock is James Maxfield.

Mr. Tonjes: Is he the man who is involved in the bankruptcy proceedings?

Mr. Steffes: In that respect he is involved in the bankruptcy [46] proceeding, in that he owns the control of the bankrupt corporation. He is involved in the other proceeding mentioned by Mr. Sandrich directly. And may I make this further suggestion, that these compromise proceedings, which I understand have been approved by Mr. Brink, who is out of town, were to go through some weeks ago, and if they had gone through, this matter would undoubtedly have been ready. A revision was made and at the present time those compromise proceedings have not been completed.

I did speak to Mr. Crawford, the trustee of the bankrupt corporation, whose duty, through counsel, it would be to prosecute—that is, to defend, rather, this particular matter, and he feels, as Mr. Rains has stated, that since the deficiency, if any, would have occurred prior to the time that he became the trustee of the bankrupt corporation, that the matter should be heard and determined after he is released from his status as trustee in bankruptcy.

The Judge: He is pretty late in making a suggestion of that sort, it seems to me. The notices were sent out and undoubtedly Mr. Sandrich, who has entered his appearance back in August, got it. I don't understand the complications.

Mr. Steffes: I think back in August—Mr. Rains,

isn't it true that other negotiations for compromise were pending and then there was a change made just comparatively recently in the bankruptcy matter?

Mr. Rains: Yes, that statement is correct.

Mr. Steffes: As a matter of fact, an order was made by Mr. Brink, and a new order was recently made, and it is the carrying out of the new order which will affect very essentially these proceedings here.

Mr. Rains: It will affect it in this respect, if the Court please, That under the plan of compromise, and which is just the matter of [47] working it out, all of the stock will go back to the corporation which is now bankrupt, Maxfield Wilton & Associates. I will answer the statement that way. I don't recall that Mr. Maxfield is the majority stockholder but, at any rate, the trustee would be right out of power. We heard nothing of this until last Friday night late, did not know of the existence of these proceedings, and we would like to keep out of the picture and let the individuals and the private corporations battle their own matters.

Mr. Tonjes: That is our position, your Honor please. We are willing to proceed with the corporation, the petitioner, and I think the affairs of the stockholder are of no concern to the Board.

Mr. Steffes: May I suggest——

Mr. Tonjes: May I finish?

Mr. Steffes: I beg your pardon.

Mr. Tonjes: We also want to make the statement that as late as Thursday of last week Mr. Sandrich

and I had a discussion and agreed to try this case today, and I can't see any reason why we can't proceed.

Mr. Sandrich: That was before—that was before I understood my witness would not be available, and for these reasons I ask the continuance.

The Judge: I don't understand about your witness. If you want him, get a subpoena out, and we will get him here. I mean that is no reason.

Mr. Rains: I suggest Mr. Sandrich make it clear to the Court why the witness is not able to testify.

Mr. Sandrich: I have explained it, the explanation that is given me. I won't say whether his reasons are valid or not. I am not able to judge those. He has given me those reasons. [48]

Mr. Steffes: May I make this answer, in explanation, to the representative of the Government, why we shouldn't proceed as against the corporation?

The corporation as a legal entity has no power to proceed. It can only, as I understand it, proceed through its board of directors, or otherwise. Now, the board of directors, the majority of the board, two out of three, were appointed by Judge James in the bankruptcy proceedings.

Mr. Tonjes: You mean this petitioner?

Mr. Steffes: The majority of the board, two out of three of the directors were appointed by Judge James, who was then alive, as the directors of the Chiquita Mining Company, Ltd., this petitioner, and I believe when the Maxfield Wilton & Associates, Inc., first went into bankruptcy, it was definitely understood that all matters would be taken up with

the Referee and instructions received. I personally believe, and it is my legal opinion, that without a definite instruction from the Referee as to how the trustee should proceed, that he couldn't legally proceed, but after the termination——

The Judge: Well, that is another matter.

Mr. Steffes (Continuing): ——after the termination of the bankruptcy proceedings, then there will be individuals rather than the appointed officers.

The Judge: I am going to set the case for Wednesday unless there is something better shown than that. You can talk with counsel, and tell him what you have to say, but what I don't understand is simply this: it seems to me here is a corporation, and I am not concerned with the stockholders or their bankruptcy proceedings. This case has been pending a long time. Notice was given. No point was made of any reason why it couldn't be tried, [49] and I don't see why the Government's tax against a corporation should be held up pending a fight among creditors or as to who may own the stock of that corporation, or what they may get out of it.

Mr. Steffes: There is no such point. It is just a question of terminating the legal proceedings in the bankruptcy court so as to re-vest the ownership, that is, the control rather than the ownership, in individuals rather than in a trustee of the court.

The Judge: Well, you can talk with counsel, but I am setting it now for Wednesday.

Mr. Steffes: I will probably have to be a witness, your Honor, and I came down from Las Vegas. I

am alone there, and I have to return tomorrow morning because I have no one to run the office, and it would work a hardship on me if I had to come back the very next day. I would suggest that the matter go further along towards the end of the calendar, if the Court can. I have certain other plans and cases pending and work to do in Nevada, and in Reno.

The Judge: Well, the difficulty I have with you is that you have no status in the case.

Mr. Steffes: I appreciated that fact, and stated it.

The Judge: Counsel is here and counsel is the only one I can actually recognize. Now, if you have anything to say, you take it up with him and let him be the spokesman, and we will get some order in the matter.

Let's call the next case.

(Which were all of the proceedings had on said date.) [50]

Thereupon the proceeding was continued for hearing to the 14th day of October, 1942, at 10:00 o'clock A. M.

Thereafter the proceeding came on for hearing on the said 14th day of October, 1942, at 10:00 o'clock A. M., before the Honorable C. E. Arundell, Judge of The Tax Court of the United States, at Los Angeles, California.

Mark J. Sandrich, Esq., and A. P. G. Steffes, Esq., appeared as attorneys on behalf of Petitioner; and E. A. Tonjes, Esq., for the Honorable J. P.

Wenchel, Chief Counsel, Bureau of Internal Revenue, appeared on behalf of the Commissioner of Internal Revenue, Respondent.

Thereupon the following proceedings were had, and testimony heard, to wit: [51]

PROCEEDINGS

The Clerk: 108263, Chiquita Mining Company, Ltd.

Mr. Tonjes: Respondent is ready.

The Member: Have you entered your appearances?

Mr. Sandrich: I beg your pardon?

The Member: Have the appearances been entered in this case?

Mr. Sandrich: I would like to enter a motion for recognition of additional counsel at this time, your Honor. Adam Paschal George Steffes.

The Member: Give it to the Clerk.

Mr. Steffes: I usually use just initials, to save time.

The Member: Have you been admitted to our bar?

Mr. Steffes: I was informed by Mr. Tonjes the other day that temporarily, for the purpose of this particular proceeding, counsel who has been admitted could move my admission. I am admitted to practice in all of the courts of the State of California and Nevada, State and Federal, and the Supreme Court of the United States, and the Treasury Department.

The Member: All we will ask is that you follow this up by making an application.

Mr. Steffes: Yes, I will.

The Member: That is all right. We will recognize you for this case.

Mr. Steffes: And I have filed my statement of appearance.

The Member: All right.

Mr. Tonjes: E. A. Tonjes appears for the respondent.

The Member: I would like to have counsel for the petitioner make a brief opening statement of what the case is about. [52]

OPENING STATEMENT ON BEHALF OF PETITIONER BY MR. SANDRICH

Mr. Sandrich: This is a petition for redetermination, your Honor, of tax liability arising out of the assessment by the Commissioner of additional tax on account of disallowance of certain items of depreciation and certain items of depletion; a disallowance of the items of depreciation brought about by the fact that the Commissioner claims a different rate from petitioner, and the disallowance of the depletion on the ground that the Commissioner claims that the petitioner has only part of a basis and has no cost basis on which to base his depletion rate.

The Member: Just what does that mean?

Mr. Sandrich: That means, sir, petitioner is a corporation to which certain assets were transferred

at its inception. The Commissioner claims that by reason of the alleged fact that the former owners of the property were in control of the corporation immediately after such transfer, that the basis in the hands of petitioner corporation should be the same basis as in the hands of the original owner. Petitioner claims that the original owners of the property were not in control of the corporation immediately after the transfer and, hence, that the assets are entitled to a different valuation to be used as a basis for depletion.

The Member: And it would be a different basis for depreciation too, wouldn't it?

Mr. Sandrich: No, your Honor, because the plant assets, machinery and equipment, were all purchased by the corporation after its incorporation. The properties transferred consist of mining claims only.

The Member: There is no question about percentage depletion in this? [53]

Mr. Sandrich: No, your Honor, not at this point.

The Member: I think I understand the question involved, and I will hear from Government counsel to see what they have to say.

STATEMENT OF CASE ON BEHALF OF RESPONDENT BY MR. TONJES

Mr. Tonjes: Those are the issues, as I understand them, your Honor. It is our contention that the various mining claims and mining rights which were transferred to the petitioner upon its reorganization, were transferred to it by two individuals, and

that they received all of the capital stock of the corporation in proportion to their holdings, and that, therefore, under 112(b)(5) of the 1928 Act, this transaction was a transaction on which no gain or loss will be recognized and, therefore, the base is the same as in the hands of the transferors; and that the issue of depreciation is merely one of the life of the properties under the circumstances under which the properties were used, and there is no question with respect to the cost, as I understand the issue; it is merely the life of the property; the rate, in other words, to be applied to it.

The Member: Would there be any question about the depletion if, in fact, we do not have a non-taxable transaction?

Mr. Tonjes: There is, then, a question of value, of course.

The Member: Which is in dispute?

Mr. Tonjes: Which is in dispute, yes, your Honor. That is the value of the property that they turned in, I believe, would be the question.

One question I would like to ask counsel. I think you stated in response to a question of the Board that the matter of percentage depletion was not in issue at this moment or at this time. Could it ever be injected?

Mr. Sandrich: I didn't mean to give that impression. It was [54] once, but there is no hope for us raising that point now. We are through with that point.

Mr. Tonjes: I have no further statement then, your Honor.

The Member: Very well. Call your witness.

Mr. Steffes: May I just add something, your Honor, by reason of the history of the case? I will try to make it brief.

On two prior occasions the question of the value—that is, the price, rather, that the corporation, the petitioner here, paid, for the mining properties was raised by the Internal Revenue Department of the United States of America. On each of those occasions we, after a discussion agreed to have our opinion coincide with that of the Government. On the first occasion, which happened in May, 1933, we paid an additional tax, and what amounted to a penalty. In approximately June or July, 1934, the company paid an additional tax, based upon the Government's contention, that is the Internal Revenue Department at Reno, and I wish to make it clear at this point that it was not merely the contention of a clerk in the office selling stamps or collecting the tax, but it was a contention made by the Internal Revenue Department at Reno, Nevada, the State where the corporation has its mining properties; and on both of these occasions the Government held that the value of the mining properties was \$500,000. When this matter was investigated by Mr. Hanson, he was at the mine and later came to my office in Las Vegas with—I don't recall the name, whether it was Whistle—it was the auditor, and Mr. Evans, a special agent of the Internal Revenue Department. We stayed discussing this particular question for I think it was several hours. Although the auditor claimed that that was not in issue, the special agent claimed

that that was a matter that should be put into the record, that is, the Government's [55] record, and as far as I know, it was put in the record. And I believe that—and it was recently confirmed within the last year and a half by an auditor of the Internal Revenue Department when an investigation was being made by the Securities and Exchange Commission, where they claimed the value was \$250,000 instead of \$500,000—that that is a matter which should be gone into and should be in issue, because the Government, I think, now claims if the question of value is in issue it will amount to approximately—I use the word “value”; I should say “price” to the corporation—it should be approximately \$100,000 or \$101,000, where we maintain it should be \$500,000 or approximately five times as much as the Government's figures are based upon.

Mr. Tonjes: Might I make just one inquiry, your Honor?

Counsel has referred to the fact that they have paid a tax. I think it might clarify the record if he states the nature of that tax, whether it be a stamp tax or capital stock tax, or what. My information is that it was a tax on the transfer of securities.

Mr. Steffes: It was both. In the first instance, in May, 1933, the local representative of the Internal Revenue Department determined that although only approximately 135,000 or 140,000 shares of stock—that is the certificates—had been issued by the corporation in payment for the mining properties, which later produced over a million dollars;

that when the deeds were transferred in legal contemplation and under the theory of the Internal Revenue Department the transaction was complete, and, therefore, the Government was entitled to the full tax of \$500 on a price to the corporation of \$500,000. That was the first. We paid a deficiency of in excess of \$300, and also what amounted to a penalty of \$40. [56]

The Member: I thing all that is utterly immaterial.

I would like to make it clear to you, as you are just new at our bar, that this determination of the Commissioner of Internal Revenue comes to us with the presumption of correctness. We have no information, nor are we the slightest bit concerned with what the Bureau of Internal Revenue has done in the past. We are trying your case just like you are entering into the Federal District Court to try it, and we have none of the records, none of the information; only this determination.

Mr. Steffes: Well, we had intended to supply that information in the form of legal evidence.

May I make this suggestion? I had the same situation in an inheritance tax case that went up to Washington, and we had an analgous situation where, although we had the determination of the State Inheritance Tax Department and the Federal Department here that we were correct, nevertheless when it went to Washington first a decision was rendered against us. We paid the tax under protest and, as your Honor suggested, we were then placed in the position of entering the Federal Court.

In that case we were able to show, as we hope we can show now, that the legal principle upon which the Government proceeded was erroneous.

The Member: That is right.

Mr. Steffes: And in that case the Government refunded the tax paid with, of course, the interest at 6 per cent.

In that particular case, too, I was told, not by the Court, but it was suggested to me by the bank which was the trustee in this estate, that I was up against a situation where I couldn't present it, and yet when it was presented the Court held that the factual situation was correct and found ultimately in our favor and refunded the tax; and I think that [57] for the benefit of all parties concerned, it will save the time of the various officials of the Government and arrive at what I would call moral justice in the payment of the tax.

The Member: That is a matter for you to negotiate with the Government, but it is not for me. You are trying a lawsuit before me.

Mr. Steffes: Yes, I understand that.

The Member: The Commissioner of Internal Revenue is before me a party litigant. He is just one of the parties to this lawsuit.

Mr. Steffes: Well, as I stated at greater length, and probably at too great length, the other day, that it is not just a simple point.

The Member: I see.

Mr. Steffes: But that when gone into thoroughly it becomes a point which is duplex, at least duplex, and in determining the case completely, both parts

of the question should be determined. That is whether first, the ordinary method of computation should be followed; and, secondly, whether the facts that I have related have a bearing upon the first situation and should legally raise, that is, cause a different conclusion to be arrived at.

The Member: All right. There is only one thing I am going to say to you. In our practice here only one person makes a statement, and only one counsel examines a single witness. So you can be governed accordingly.

Mr. Steffes: Well, I will ask permission to make a statement because of that particular fact, and I did ask at the beginning of this whether I could make such a statement.

The Member: Very well. Call your witness.

Mr. Steffes: Counsel and I wish to be understood that for the [58] purpose of this proceeding that I will be of counsel with Mr. Sandrich, who is admitted before the Board. I have already filled out the blank and filled out my statement of appearance. Am I correct in that assumption, that I will be allowed to——

The Member: You will be recognized for this case.

Mr. Steffes: Yes.

Mr. Sandrich: Your Honor, at this time I would request that a subpoena be issued for the appearance of James Maxfield and Hugh Wilton as witnesses for petitioner.

The Member: Where are they, in the court room?

Mr. Sandrich: I think Mr. Steffes has knowledge of their whereabouts.

Mr. Steffes: May I?

The Member: It seems to me you are pretty late in asking for subpoenas. I will issue the subpoenas if you want them, if you have made application for them, but I am not stopping the proceeding. I am going ahead.

Mr. Steffes: Well, may I just make a statement on that point to clarify it?

Day before yesterday Mr. Sandrich refrained, undoubtedly on account of Mr. Maxfield and Mr. Wilton, for their sake, to state the reason why there were complications pending before the Federal Court was that Mr. Maxfield and Mr. Wilton were indicted by the Federal Court in Nevada on income tax matters which are approximately the same dates and relate to the same mining properties, the income from the same mining properties. Mr. Wilton has his own counsel, who is Mr. Alfred L. Bartlett of this city, and I represent Mr. Maxfield in the Federal Court. That matter has not [59] been disposed of but is now pending on demurrer before the District Court of the United States in and for the District of Nevada, and it was because of Mr. Bartlett's advice, first, to Mr. Wilton, and then my corresponding advice to Mr. Maxfield that this application comes at this time.

The Member: Now, how do you expect to get them here? This is the time to hear this case. I will have my clerk go ahead and make out a sub-

poena and give it to you. In the meantime, proceed.

Mr. Sandrich: I will call Mr. James J. Smith.

EVIDENCE ON BEHALF OF PETITIONER

Thereupon the petitioner, to maintain the averments of its petition, introduced the following proof:

MR. JAMES J. SMITH

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sandrich:

Q. Mr. Smith, you are acquainted with the petitioner, Chiquita Mining Company, Ltd.?

A. Yes, I am.

Q. Are you connected with petitioner?

A. Yes.

Q. Will you please explain to the Court your present connection with petitioner?

A. I am the president of the company.

Q. Will you please explain your connection with the company between the early part of November of 1932, and the end of December, 1939?

A. I was the manager of the company. [60]

Q. Did you have any title in the company? Were you an officer or a director?

A. Yes. The fore part of that period I was vice president. The latter part I was president and director.

(Testimony of James J. Smith.)

Q. Prior to November, 1932, did you have any connection, any interest in the assets that were turned over to Chiquita Mining Company, Ltd., a corporation, exchange for part of its capital stock?

A. Yes, I did.

Q. Will you explain to the Court what connection you had there, what rights you had in that, interests?

A. Well, I was a party of the original owners that owned the property before turning it over to the *in* corporation.

Q. What did the property consist of?

A. In mining claims.

Q. Who else besides yourself was interested, had any interest in those mining claims?

A. Yes; other parties.

Q. Would you name them, please?

A. Otto F. Schwartz, Fred Reim, Sam McClanahan, Jack H. Smith, C. P. Smith, Jack Falbey, Tom Keeler.

Q. Are you acquainted with James Maxfield?

A. Yes, I am.

Q. Are you acquainted with Hugh Wilton?

A. Yes.

Q. Will you tell the Court in what way those two parties participated in the formation of the corporation?

A. Yes. It was agreed by the original owners, the parties I have just [61] named, that Maxfield and Wilton should incorporate the property for

(Testimony of James J. Smith.)

the purpose of obtaining finances to develop the property.

Q. And there were written agreements to that effect? A. Yes.

Q. Were you one of the parties to the written agreements? A. Yes, I was.

Q. And were you one of the parties appearing as owner of the claims which were transferred to the corporation? Did you sign those agreements?

A. No, I didn't.

Q. Will you explain why?

A. It was agreed between the parties interested, there being so many, that the work, the actual agreement would be carried on by two members of this group, Jack H. Smith and Otto F. Schwartz, and all documents and agreements were signed by these two persons.

Q. Did you have knowledge of the contents of all of these documents and agreements that were signed by these two persons with regard to these transactions? A. Yes, at all times.

Q. How did you gain that knowledge?

A. Through discussions with these two parties, Jack H. Smith and Otto F. Schwartz.

Q. Did you ever discuss it with the other parties to the agreement; namely, Maxfield and Wilton?

A. In nearly all cases.

Q. Did you ever discuss the contents of these agreements when Otto F. Schwartz and Jack H. Smith and Hugh Wilton and James Maxfield were all [62] present at the same time?

(Testimony of James J. Smith.)

A. At times, yes.

Q. You are, then, familiar with all the agreements contained in those instruments?

A. Yes, I am.

Q. What exactly were your duties at the mine?

A. During the fore part or the latter part of this period?

Q. Beginning with the fore part and working up. I don't ask for very long.

A. I was just a worker.

Q. What do you mean by that?

A. Well, I was one of the seven original parties who opened up the mine and were continuing to develop it. This work was carried on during the time of this negotiation, and for a time afterwards.

Q. Now, after the company was incorporated, what became your duties?

A. For the first year exactly the same, as an operator.

Q. And will you work up from there, please?

A. Then in '32, Jack H. Smith, who was my brother, died, and at that time I took his place as president and manager of the company.

Mr. Steffes: What year was that?

The Witness: That statement is erroneous. He took sick at that time and his death didn't occur until a couple of years later. But it was at that time that I took over the management of the property.

By Mr. Sandrich: Q. In the management of

(Testimony of James J. Smith.)

the property you exercised a certain amount of administrative and supervisory duties? A. Yes.

[63]

Redirect Examination

By Mr. Sandrich:

Q. Mr. Smith, following your cross examination yesterday, you and I consulted certain files and records and had certain conversations with regard to certain testimony that you had given, for the purpose of refreshing your mind on certain angles, did we? A. Yes.

Q. Your recollection as to certain items is now a little different from what it was on those certain points? A. Well, yes, it is.

Q. I would like to take you back over some of that. You stated in your answers yesterday to Mr. Tonjes that the original cost of equipment was \$10,000. Did you mean all of the equipment or part of the equipment, or what did that \$10,000 cover?

Mr. Tonjes: If your Honor please, I object to the question. It is quite obvious that there are some written records here by which these various facts can be proven. I presume they are corporate records. I object to the witness testifying as to his recollection, and his construction placed upon his examination of documents is not the best evidence.

Mr. Sandrich: The documents here concerned, your Honor, constitute the records of the corporation, and I would like to explain that. The corpo-

(Testimony of James J. Smith.)

ration was formed in the latter part of 1932, and between that time and some time in 1938 there were no adequate records kept. They did the best they could. They kept all of their checks, they kept all of their invoices and vouchers, and they made several abortive attempts to keep a cash book. In the beginning at 1938 I was retained to make a complete audit of the affairs of the corporation, to do whatever was necessary to be done to disclose any [64] additional tax liability, of which I found somewhere near \$7,000 and which they paid voluntarily. I have a complete set of audit files on the case, which practically sets forth each individual transaction. Now, I say, "practically." There may be a dozen or so not there, as will happen in the most careful audits. I did not put the details of my audits into any book of accounts, but kept my working papers as the records of that company.

During the latter part of 1938 or the beginning of 1939 we did set up a system of accounts and books and we opened that by entering therein my balance sheet as of that date as a beginning point. My audit files, therefore, will constitute the records of the corporation, the books, you might say, of the corporation, prior to the time in late 1938 or the beginning of 1939 that we opened up formal books of account.

The Member: Well, I am going to overrule the objection anyway. The witness can answer the question.

(Testimony of James J. Smith.)

Thereupon the question was read, and the witness proceeded to testify at length concerning the facts relating to the issues of depreciation.

On the completion of said testimony on said issue of depreciation, the witness was excused.

Thereupon the proceedings continued as follows:

[65]

Mr. Sandrich: This is on depreciation. I would like to ask Mr. Steffes to take the stand, please.

MR. A. P. G. STEFFES

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sandrich:

Q. Will you state your name, please?

A. A. P. G. Steffes.

Q. In addition to any connection you might have as counsel in this case for Chiquita Mining Company, Limited, a Nevada corporation, have you any connection with that corporation?

A. Do you mean had I and have I?

Q. Have you at this present time?

A. Yes. I represent the Chiquita Mining Company, Limited, in certain litigation, and have represented the company since May, 1933.

Q. At any time during your representation of the company were you charged with the duty of

(Testimony of A. P. G. Steffes.)

retaining the services of a certified public accountant? A. I was.

Q. And for what purpose, please?

A. We had certain litigation pending in the 8th Judicial District Court of the State of Nevada, in and for the County of Clark, on a mandamus proceeding, brought by a stockholder or a small group of stockholders, and at that time I stated to the court that a complete audit would be made by a certified public accountant of all of the books and records of the corporation from the time the corporation first formed and took over the properties, up until the—up until that time or at the end of the taxable year, which was, I believe, December 31, 1938. [66]

Q. Did you obtain the services of such an accountant? A. I did.

Q. And who was he, please?

A. Mark J. Sandrich, a certified public accountant, in Los Angeles, California.

Q. Did you instruct the certified public accountant with regard to what you wanted him to do? A. I did.

Q. Will you kindly repeat the instructions that you gave him?

Mr. Tonjes: May I ask the purpose of this line of questioning, your Honor? I think it would be pertinent.

Mr. Sandrich: Yes, your Honor. I have explained before that the company had no books and records. What I am leading up to is an offer of

(Testimony of A. P. G. Steffes.)

my audit records of that period as the records of the corporation.

The Member: Well, as I understand the question, on the point that is being tried, of the rate of depreciation on certain mining machinery and equipment, the parties are in agreement on the cost; the question is, what is the life? I can't see where a lot of this testimony is relevant.

Mr. Sandrich: There seems to have been some difference of opinion, your Honor, or at least difficulty regarding amounts and dates and quantities, and I wanted my records here for the benefit of counsel for respondent and myself.

The Member: Well, it seems to me it would be very doubtful whether it is admissible, but I would have to reserve that until it is offered and see just exactly how it is offered. But you have a very narrow question here, and what testimony you offer ought to be on that one question: How long the machine will last for the job it's doing.

Mr. Sandrich: I will withdraw the question, your Honor. [67]

The Member: Any further questions of this witness?

Mr. Sandrich: No.

The Member: Just step down, please.

Witness excused.

Mr. Sandrich: I have succeeded, your Honor, in having served subpoenas on James Maxfield and Hugh Wilton, and they are now available. I would like to call James Maxfield.

Mr. Sandrich: Your Honor, at this point I desire to make an offer to counsel for respondent of all of my audit papers and any other of my papers and files which I might have in connection with the audit or with the books and records of the company covering the period from the company's inception up until such times as formal books of accounts were opened.

Mr. Tonjes: You are offering that to me?

Mr. Sandrich: Yes.

Mr. Tonjes: For what purpose?

Mr. Sandrich: For your inspection; and when I have an opportunity to bring them into the room I shall offer them as evidence, as exhibits.

Mr. Tonjes: Let that fact be noted, your Honor. I don't think I need make any remarks at this time.

Mr. Sandrich: I would like to call Mr. Maxfield.

Mr. Steffes: Mr. Maxfield and Mr. Wilton were here but they are out now. May I call them?

The Member: How much longer do you expect to be, Mr. Sandrich?

Mr. Sandrich: On this depletion, your Honor, I will need at least two and a half hours.

Will Mr. Maxfield please take the stand? [68]

MR. JAMES MAXFIELD

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sandrich:

Q. Will you state your name, please?

A. James Maxfield.

Mr. Steffes: At this time may I step out of the role of associate counsel in this tax proceeding, because I also represent——

The Member: I am sorry, but you cannot take these dual roles that you have attempted several times in the court room. I am going to recognize you, as I told you, as an associate counsel, and if you have anything else to say you will have to say it as a witness on the stand.

Mr. Steffes: No. Your Honor didn't permit me to finish. I am appearing as the attorney, duly licensed to practice in this Court and the Federal Court of the State of Nevada, for this particular witness in a proceeding pending in the United States District Court in and for the District of Nevada, and since I am his sole counsel in that proceeding, I desire to represent him, as it is my legal and ethical duty to represent him when he is called as a witness in a matter which vitally affects the proceedings pending in the United States District Court in and for the District of Nevada, and I am not appearing, as I did on the first day, as a witness, but I am appearing as an attorney

(Testimony of James Maxfield.)

at law, duly licensed in all the courts of this state and the State of Nevada and Supreme Court of the United States and all the Federal Courts.

The Member: Well, you are not going to be recognized in any such way. Now, you are here as counsel of record for the Chiquita Mining Company and you are calling this witness to the stand and by calling him you [69] are vouching for him. Now, that's all. If your duties are such that you cannot occupy the dual position, you should withdraw from the case. You should not put yourself in a position of having inconsistent duties or allegiance here.

Mr. Steffes: They are not, and under the law, as I understand it, they are not inconsistent or dual. They are cumulative, in that——

The Member: Well, I don't want to argue it with you.

Mr. Steffes: Well, then I will——

The Member: Are you calling this witness?

Mr. Steffes: I am not calling the witness. Mr. Sandrich may call the witness and the witness may speak for himself and testify or refuse to testify on whatever grounds that he desires to do so.

The Member: Let us proceed.

By Mr. Sandrich:

Q. Did you state your name? Or, if you didn't, will you state your name, please?

A. James Maxfield.

Q. What is your line of work, Mr. Maxfield?

A. I am a financial man, and a mine operator.

(Testimony of James Maxfield.)

Q. What was your line of work in the latter part of the year 1932?

A. I was corporate manager, mining, and other enterprises.

Q. Had you ever had any experience, or had you ever made it a part of your business to secure capital for companies or for newly formed companies?

A. I think at this time I should explain to your Honor that I am going to refuse to testify any further in this proceeding. I refuse on the grounds that I am now under indictment by a Federal Grand Jury in the State of Nevada, and that indictment is pending before Judge Norcross now, and to testify without the advice of counsel or to go any further in this matter at this [70] time would be to place myself in a peculiar position, where I would not understand—I am not trained to understand the matter or whether I should or shouldn't testify. I am under indictment by the Federal Grand Jury on the solicitation of the Internal Revenue Department.

By the Member:

Q. May I ask you this? A. Yes.

Q. Is that indictment at all connected with this Chiquita Mining Company?

A. The indictment grows out of and all of the charges in the indictment, as I read them, are a direct result of the Chiquita Mining Company's affairs and my connection with the Chiquita Mining

(Testimony of James Maxfield.)

Company's affairs, as the Internal Revenue knows, and that was the reason why I didn't voluntarily appear here as a witness.

As soon as the indictment is disposed of I would like to have my day in court, to come in here and explain the situation and testify fully. I find myself very much embarrassed that I have to come before any court and refuse to testify on any grounds. I resent the indictment. I resent the implications.

The Member: Now, just a minute.

Have you anything to say, Mr. Sandrich?

Mr. Sandrich: Not to this witness, no, your Honor.

The Member: Well, if this witness has been charged with the violation of the law under a criminal indictment growing out of some transactions with this company or its financing, or what not, I think that he may very well plead that it may tend to incriminate him.

Mr. Sandrich: Your Honor, I agree with that, and I have no desire to force the witness to incriminate himself.

The Witness: May I interrupt there? I am not saying that I would incriminate myself in any way.

[71]

The Member: No.

Mr. Sandrich: May I amend that? I have no desire to place the witness in any kind of an embarrassing position or to be the cause of any implications arising. I merely want to state to your

(Testimony of James Maxfield.)

Honor that Mr. Maxfield, because of his close connection with all of the affairs that have to do with this depletion matter, and because of his almost total knowledge of very important affairs that have to go into it, is a very important witness.

Mr. Tonjes: For the record, your Honor, I think it might be proper for me to state that from my knowledge of the facts in this case, Mr. Maxfield did play some part in the organization of the petitioner, and the issue before the Board in the depletion question, as I gather, relates to the manner in which the petitioner acquired certain assets and whether or not the purchaser from whom they acquired those assets remained in control of the petitioner, and it is my belief that Mr. Maxfield might know something about the affairs, I mean the circumstances surrounding the organization of the petitioner. Whether he is a necessary witness or not, I am not prepared to state.

Mr. Sandrich: May I take the liberty of adding to your remark, counsel? Mr. Maxfield not only has some knowledge of those affairs and Mr. Maxfield not only played some part in those affairs; Mr. Maxfield, I believe, played the main part in those affairs and had a total, first hand knowledge of all of them.

The Member: Well, I don't know what all these things are about.

Mr. Sandrich: I merely want to let your Honor know the importance of Mr. Maxfield to our case. I have no further questions.

The Member: Step down.

(Witness excused.) [72]

The Member: It seems to me any one of many people could testify as to the mechanics of the operation whereby the property was taken over, and there must be written contracts that disclose how it was done.

Mr. Sandrich: Those written contracts, your Honor, have been delivered to the Treasury Department and to the S.E.C. and at the present time I haven't been able to get hold of them.

The Member: You could have gotten hold of them by a subpoena.

Mr. Sandrich: If we could find them, to know where they are at this time.

Mr. Steffes: You see, Mr. Crupf, the investigator, died, and we offered all of the records and contracts, everything, gave them into his possession, and things like that, and certain of these things we have been unable to locate. I was called in at the last minute and didn't expect to act as counsel until a certain emergency arose a year ago, or almost a year ago.

The Member: Call your next witness, Mr. Sandrich.

Mr. Sandrich: Mr. Wilton.

MR. HUGH WILTON

called as a witness by and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sandrich:

Q. Will you state your name?

A. Hugh Wilton.

Q. Mr. Wilton, do you refuse to testify?

The Member: Now, wait a minute. Just let us ask him some questions.

Mr. Sandrich: All right, your Honor.

The Member: And if the time comes that he thinks that any part of them involve this and he wants to say so, all right. [73]

Mr. Sandrich: I was merely trying to save your Honor's time. I am sorry, sir.

By Mr. Sandrich:

Q. What is your line of work, Mr. Wilton?

A. Real estate broker.

Q. What was your line of work in the latter part of the year 1932?

A. I was working for Mr. James Maxfield.

Q. In what capacity, please?

A. I was associated with him in the financing of the Chiquita Mining Company.

Q. And what part did you play in said financing?

The Witness: Your Honor, I would like to refuse to answer those questions on the general conditions that Mr. Maxfield named.

(Testimony of Hugh Wilton.)

By the Member:

Q. You are under indictment?

A. I am also under indictment on the same charges.

Q. Do you know what the nature of the indictment is? What does it charge?

A. Well, I read the indictment over, your Honor, but I don't fully understand—I didn't fully understand it. Charges were four, I believe, in number. Generally, as I understood it, it was fraud arising out of the sale of Chiquita Mining Company stock in regard to profits that were allegedly made from the sale of the stock.

Q. Well, is it a State charge or Federal charge?

A. Federal charge.

Q. Using the mails? A. No. [74]

Mr. Maxfield: No, your Honor, it isn't, and may I interrupt?

The Member: Just a minute.

Mr. Maxfield: My future is tied right up to this, to what this man says, and I am not represented by counsel.

The Member: Now, just be patient.

Mr. Maxfield: We are under common indictment, if your Honor please.

The Member: Just be quiet. There will be nothing that will affect you at all.

Mr. Maxfield: This is making a record.

The Member: No.

Mr. Steffes: Sit down, please.

(Testimony of Hugh Wilton.)

By the Member:

Q. You have the feeling that it would not be wise, by reason of that indictment, to testify?

A. Yes, I have, your Honor.

The Member: I will not require you to answer under the circumstances.

Anything further?

Mr. Sandrich: I would like to ask a question, your Honor, in order to save time. I would like to ask the witness at this point whether he will or will not answer my further questions, to save the Court's time, and that will be the only question I have.

Mr. Steffes: I believe that has been answered. He refuses.

Mr. Sandrich: That is all I have, sir.

The Member: Very well, you can step down.

(Witness excused.) [75]

Mr. Steffes: May I be heard on one subject as counsel in this proceeding?

I personally know of my own knowledge that one of the men, Mr. Maxfield, is the only living man—Mr. James J. Smith's brother being the other—of certain conditions arising or affecting the depreciation of the unit purchased at the Belle Helen mine on the other side of Tonopah, and I personally know that the testimony of both of these two men is vital and essential to a proper and complete determination of the issues before the Board.

The Member: Just proceed with your case.

Mr. Steffes: I suggested, since counsel called the witnesses, that he make the motion but he requested me to make the motion in this proceeding, that in view of the refusal of the last two witnesses, Mr. James Maxfield and Mr. Hugh Wilton, to answer further questions on their constitutional grounds, which I believe the Court understands, that it is essential to a proper disposition of this case that the hearing, insofar as proof on the part of petitioner is concerned, be continued until such date as that constitutional guarantee is removed by a final disposition of the indictments pending against the two witnesses last called, and I so move, and under the rules I shall prepare a motion to that effect, unless your Honor will dispense with the necessity of a written motion for a continuance upon the grounds stated.

The Member: That motion will be denied. I don't think that you make a case at all.

Mr. Steffes: I didn't understand.

The Member: I say I don't think you make any case for your position at all.

Mr. Steffes: On—— [76]

The Member: Now, just a minute, if you will just listen to me.

Mr. Steffes: I thought your Honor had finished.

The Member: No, I haven't. This case has been set a long time. You yourself, say, are counsel for these witnesses who refuse to testify. You have known all about it. Now, all we want to know in this case is how a certain transaction was carried but, not the details, but the broad general principles,

to see whether you come within the Revenue Act. Now, there is no showing—there might be any number of people who would know about it. I would think any person who had anything to do with it would know about it.

Mr. Steffes: Well, I could testify——

The Member: Now, you cannot come into court in this manner at the last minute and ask for continuances and delays for reasons of this sort.

Mr. Steffes: May I suggest that the cause for the delay was not occasioned by these defendants in the indictment proceedings before them, but was caused by, may I say, the routine of the District Court in which the indictments are pending; that just recently, and the last step taken—that is, we filed our brief within the time, by associate counsel—was a request for a continuance by the Government to file a brief on a demurrer to the indictments, and that request was primarily occasioned by the fact that the Assistant United States District Attorney who had handled the indictment had just resigned before the demurrer was filed for the purpose of running for another office in the State of Nevada, and a younger man who did not know the facts as well as the man handling the case took it over and requested a certain length of time, which was later extended by the Court, within which to file a reply to our memorandum of points and authorities, which were filed promptly and on the day that we appeared and filed the demurrer, and also a motion for a bill of particulars; and we have tried

to hurry this matter and to have eliminated as much as we could. [77]

The Member: Mr. Sandrich, do you have anything further to offer?

Mr. Sandrich: Mr. Steffes, please.

The Member: I noticed in your statement that you named some seven people who were interested in this matter.

Mr. Sandrich: I believe I mentioned several people.

The Member: Not several but seven.

Mr. Sandrich: Seven?

The Member: Yes.

Mr. Sandrich: Yes, sir.

The Member: I should think any one of the seven, plus the documents, could establish what you are talking about.

Mr. Sandrich: I believe I can with this witness, your Honor.

The Member: All right.

Mr. Steffes: Should I be sworn again?

The Member: No, you have been sworn once in the case.

MR. A. P. G. STEFFES

having heretofore been first duly sworn was recalled to the stand, and was examined and testified as follows:

Direct Examination
(Resumed)

By Mr. Sandrich:

Q. Mr. Steffes, will you please state what your duties or what you did in connection with the—I will withdraw that. Will you please state what you had to do with the original agreements between the parties constituting the original owners of the mining claims transferred to Chiquita Mining Company, Limited, and the transfer of said claims, the receipt thereof by the Mining Company, and the issuance of stock therefor? Will you please state what you had to do with regard to those matters?

A. With reference to the original transfer of the claims constitut- [78] ing 14 mining claims to the——

Mr. Tonjes: I object to that, your Honor, as not being the best evidence of what was transferred to the corporation and what the claims were.

The Witness: Well, I will withdraw that portion of it. With reference to the transfer of certain mining claims to the Chiquita Mining Company, Limited, which occurred immediately after the incorporation——

Mr. Tonjes: I object to the witness stating when the properties were transferred, your Honor. The deeds and the records of the corporation are pre-

(Testimony of A. P. G. Steffes.)

sumably all available, and to have this witness narrate what his construction of the facts are is highly objectionable.

The Witness: May I——

The Member: Just a minute.

Mr. Sandrich: I don't see, your Honor, that the witness is narrating his construction of the facts. The witness is speaking of his own knowledge, because he actually saw and inspected and in a good many cases prepared the documents effecting such transfers.

The Member: Well, it seems to me that you must bring the witness by some short question and answers to the point as to whether he can testify.

Mr. Sandrich: Yes, your Honor.

The Member: Now, it isn't necessary, if you ask him what his connection with it is, that he should tell the life history. He can say "I was counsel for the sellers," or "the purchasers," and stop, and you ask another question and we can see where we get.

Mr. Sandrich: Yes, your Honor.

By Mr. Sandrich:

Q. Did you represent the Chiquita Mining Company, Limited, in the acquisition by it of the 14 mining claims originally transferred to it by Jack H. Smith and Otto F. Schwartz? [79]

A. Not at the exact beginning.

The Member: Just answer yes or no.

(Testimony of A. P. G. Steffes.)

By Mr. Sandrich:

Q. Did you at any time represent Chiquita Mining Company on those particular matters?

A. I did.

Q. When?

A. I began to represent the Chiquita Mining Company, Limited, during the month of May, 1933.

Do I have the privilege here, as in other courts, to explain the answer; that I also represented all the other parties connected with the transactions; that is the miners and Mr. Maxfield, and Mr. Wilton, who handled the affairs? May I have that privilege?

The Member: You have already answered, haven't you?

The Witness: Well, I, as counsel, will be willing to stipulate to strike if I don't have the privilege.

The Member: That is enough. You have said enough.

By Mr. Sandrich:

Q. In connection with those particular transactions, did you represent in any way James J. Maxfield? A. I did.

Mr. Tonjes: I object to the question, your Honor, as being irrelevant and immaterial. The issue in this proceeding on this issue is whether or not the persons who transferred the property to the petitioner at the time of its organization had, after its organization, the same interest in the corporation as they theretofore had in the properties trans-

(Testimony of A. P. G. Steffes.)

ferred; and the corporation was organized in 1932, November 18, 1932, to be exact, and it acquired these properties, as I understand it, sometime prior to the date to which the witness is referring. [80]

Mr. Sandrich: Your Honor, these questions are leading directly to that point. I am only attempting to show that the witness is capable of answering such questions with regard to those agreements and those transactions as I shall ask him, because even though he did not come into the picture until a short time afterwards, he had control of, inspected, discussed with the principals and advised on the documents that reflected those agreements, and also in certain very important particulars was under the necessity of making some adjustments and some corrections of contradictory or erroneous portions thereof. Therefore, I maintain that these questions do lead to the point.

The Member: Well, I want you to have every opportunity, but I want it to be conducted in the way a lawyer would conduct it, and I want this gentleman to realize that he is here as a witness **now** and not as an attorney, to answer questions the way a witness would answer; no arguments.

Mr. Sandrich: I will do my best, your Honor.

The Member: No long involved answers, but as concise as you can make it.

Mr. Tonjes: Might I renew my objection at this time, and might I state I necessarily have to be very precise in the character of testimony that comes in,

(Testimony of A. P. G. Steffes.)

due to the fact that there are some other proceedings pending and what might be adduced in this proceeding might have some bearing on the other proceeding; therefore, I am going to be as technical as I can in order to protect the record.

Mr. Maxfield: May I inquire as to what proceedings counsel refers to?

The Member: I must say that you cannot act in this matter. You are in court.

Mr. Maxfield: I realize that.

The Member: You are not a petitioner to this proceeding.

Mr. Maxfield: I realize that but I am here without counsel. [S1]

The Member: Just be seated.

Mr. Maxfield: And this man is my counsel.

The Member: You just be seated.

Mr. Maxfield: And he is being asked to testify.

The Member: You just be seated now.

Mr. Sandrich: Will the Reporter please read back the last question that I asked?

(Whereupon the reporter read the question as follows: "Q. In connection with those particular transactions, did you represent in any way James J. Maxfield?")

By Mr. Sandrich:

Q. And in connection with those particular transactions, did you represent in any way one Hugh S. Wilton? A. Hugh Wilton. Yes.

Q. Hugh Wilton. And in connection with those

(Testimony of A. P. G. Steffes.)

particular transactions, did you represent Jack M. Smith? A. I did.

Q. In connection with those particular transactions, did you represent Otto F. Schwartz?

A. I did, indirectly.

Q. Will you please explain what you mean by that?

Mr. Tonjes: I object to the question as being irrelevant and immaterial, your Honor.

Mr. Sandrich: The question is material, your Honor, because Otto P. Schwartz was one of the original parties to all of these agreements.

The Member: What are you trying to get, what point, with this witness?

Mr. Sandrich: I am trying to establish the fact that this witness [82] knows of his own knowledge certain elements of the agreements and actual occurrences in connection with the transfer of properties to Chiquita Mining Company, Limited, and the issuance of its stock for those properties that result in the owners of the properties not being in control of the corporation after such transfer.

The Member: I take it the transaction was in writing. That is, a transaction certainly conveying the mining claims would be.

Mr. Sandrich: Yes, your Honor.

The Member: And I suppose the agreement to transfer to the corporation for shares of stock was in writing?

Mr. Sandrich: There were a number of agreements. There seemed to have been some confusion

(Testimony of A. P. G. Steffes.)

in the early stages of the game, your Honor, and it appears that a number of the matters were handled in a manner not contemplated or not desired by the parties, and a great number of adjustments, amendments and substitutions were made which result in a very complicated mess, to use that word. Now, your Honor remarked a while ago that your Honor was interested in the broad aspects of the thing and was not so much concerned with the details but wanted enough to show whether or not this situation resulted in the original owners of the mining claims having the control of the corporation after such transfer.

The Member: But it has got to be in a legal way.

Mr. Sandrich: I am trying to do it in a legal way, your Honor. I am trying to question this witness.

The Member: The way to do it is to first produce the contracts, put people on the stand to identify them, bring out the minutes of the corporation, if you have anybody who was actually a party to the contract to explain it, bring them and put them on the stand. [83]

Mr. Sandrich: Those are in existence, your Honor, but they are not in court. Some of those records are in Nevada. Some of those records are in the hands of the Treasury Department, and I believe some of them are in the hands of the S.E.C.

The Member: They all can be reached by a subpoena, anywhere in the United States.

(Testimony of A. P. G. Steffes.)

Mr. Sandrich: May we have sufficient time in which to secure those records?

The Member: This is your day in court.

Mr. Sandrich: Well, it seems that if we haven't got the records we haven't got a chance to secure the records, and if your Honor won't permit our oral testimony——

The Member: I don't see where you are going to produce oral testimony as to a transaction that was covered by a written contract unless you first make that showing which would entitle you to use secondary evidence. Now, your very statement is that those agreements are about but you haven't seen fit to get them.

Mr. Sandrich: I didn't mean to put it that way, your Honor. I haven't been able to get them. Doesn't that rule apply, your Honor, only in trying to establish the contents of those agreements as such, verbatim, and not the intent and purpose?

The Member: Well, once we have the agreement, if there is some ambiguity about it, or something of that sort, it may be explained, but it is not going to be explained by somebody who is not a party to it. As I understand it, this witness didn't draw those contracts.

Mr. Sandrich: Your Honor, this witness drew a number of the effective contracts and was under the necessity of redrawing a number of the [84] original contracts which have not been properly prepared.

(Testimony of A. P. G. Steffes.)

Mr. Tonjes: That is a conclusion as well, your Honor.

Mr. Sandrich: It is not a conclusion, counsel, because I have in the past seen those contracts. I have discussed them with as many of the parties involved as I could reach and they have all told me that the contracts as amended or as corrected, or what you will, by this witness, did in the end reflect what they originally had in mind.

Mr. Tonjes: That, perhaps, is so, and if the proof of those facts can be adduced, we might have that result, but I want the proof; either counsel's statement or this witness' statement to that effect.

Mr. Sandrich: I will excuse the witness, your Honor.

The Member: Very well. I will give you a five minute recess.

Thereupon a recess was taken for five minutes, at the conclusion of which, the following occurred:

Mr. Steffes: If the Court please, as part of filing my application for admission, it was necessary for me to read the rules, and I wanted to verify my understanding of a certain rule that I read yesterday with reference to the motion for a continuance, so that the record may be clear. I made a motion for a continuance when the two witnesses refused to answer on constitutional grounds and at that time I mentioned my willingness to reduce that motion to writing. Under Rule 20 of the Board they

should be in writing, and I did not clearly understand whether the denial of the motion was made because the motion hadn't previously been placed in writing or whether it was made upon general grounds and that this Member of the Board, in effect, waived the necessity of reducing it to writing.

The Member: That is right. There is no necessity for a motion for a continuance in the midst of a trial to be in writing. [85]

Mr. Steffes: Well, the rule is quite general and by reason of the fact that I am a novice in trying these matters as disclosed, I wasn't sure just what modification to that rule had been made.

The Member: I do not regard the motion as timely or meritorious. There was no satisfactory showing to me that evidence was not available to prove the issues in the case. The case was set a long time ago, set in August, and you were counsel, so you state, for the very witnesses who are refusing to testify. You were fully aware of the whole matter and the motion for a continuance under these circumstances is not timely or meritorious and is denied.

Mr. Steffes: I hesitate——

The Member: You can except to it or not, but I don't want to hear any more about it.

Mr. Steffes: We do except to it, and at the time this matter was first set for hearing on August 26th we were then waiting the brief of the Government in the Internal Revenue matter in Nevada.

And—well, there was another matter that came to my attention that I don't think I should state.

The Member: Mr. Sandrich, you are the chief counsel in this matter. Have you anything further?

Mr. Sandrich: Your Honor, I would like to request at this time that Mr. Steffes be permitted to make such representations to the Court, because of conditions that I don't want to go into too deeply. I feel at this minute inadequate to go into much discussion or argument. In other words, I don't feel very well. I would like to get Mr. Steffes permitted to take over.

The Member: What is it you want him to do?

Mr. Sandrich: I would like to have him permitted to make any representations or other language as he find necessary or desirable to make [86] in addition to what has been said.

The Member: Call any witness that you have, Mr. Steffes. Let us proceed.

Mr. Steffes: I would like to make a showing as the reason for the absence of documentary testimony at this time—well, I would like to make that showing so as to lay the foundation for the production of secondary evidence in lieu of such primary evidence.

The Member: Well, what are you going to do? Go ahead.

Mr. Steffes: In this matter, if the Court please, for a period of approximately 18 months, all of the books and records of the corporation and all of the audit figures, the audit spreads and records of Mr. Sandrich were made to Mr. Crupf of the S.E.C. I

didn't know until about six months after his death—the investigation suddenly stopped and about six months later I found out that he had died. He died about a year ago. By reason of that fact I personally know——

Mr. Tonjes: If your Honor please, I object to the witness' or counsel's statement as not being material to the proceedings here. I am willing to listen to any secondary evidence he has to offer. I thought that was the purpose of your Honor's statement just now, to permit him to offer secondary evidence, and I see no purpose in him making this statement at this time.

Mr. Steffes: Well, the secondary evidence, may I suggest to counsel, for the enlightenment of your Honor, would be my personal knowledge of those documents which I personally prepared and some of which, at least, I personally turned over to Mr. Crupf of the S.E.C., and by reason of which we have been unable to get the original documents or to locate where they are. The situation is this——

The Member: Now, let me ask you something. We are just going along [87] here and taking a lot of time. Do you understand what you have to prove in this proceeding in order to prevail?

Mr. Steffes: Yes, I believe I do.

The Member: All right, now state it to me, what you have to prove.

Mr. Steffes: I believe that we should prove—may I put it this way? The Government has fixed a 10 percent or 10 year life on the personal property which is the subject matter of the depreciation

question now being tried; whereas the petitioner has fixed one-half of the life of that personal property as the proper basis of computation.

The Member: All right, now. As I understand you, counsel, we have already disposed of that part of the case. Now, what about the other part?

Mr. Steffes: No.

The Member: Oh, yes.

Mr. Tonjes: Counsel rested, if your Honor please. That is my recollection.

The Member: Counsel rested on that part of the case. Now, what is the other part that you were going to prove?

Mr. Steffes: Well, I either wasn't listening—because I had a definite discussion with counsel to the effect that the witnesses Maxfield and Wilton would be called upon the conclusion of that particular point and prior to the taking up of the depletion point.

The Member: We are concerned now with the depletion point. Now, what is it that you think you have got to prove?

Mr. Steffes: Well, if the Court and counsel feel and hold at this time that petitioner has rested upon the question of depreciation, I wish to state to the Court that it is not my understanding; and I will verify it with my associate counsel. I understand counsel, although I tried to make myself [88] clear to counsel that we desired to have the matters which I intended to discuss taken up during the depreciation part of the hearing, but he states that they

have rested on that part, and on account of the relative situation between depreciation and depletion, I have no serious objection there. However, do I understand correctly that the witnesses Maxfield and Wilton refused on constitutional grounds to testify during the depreciation part of this hearing?

The Member: Well, didn't you call the witnesses yourself?

Mr. Sandrich: No, your Honor. I called those two.

The Member: Well,——

Mr. Steffes: That may be so.

The Member: Just a minute. To get this in the record, you people there, you and Mr. Sandrich, are acting as a unit in this proceeding. Now, what one does the other is bound by. You are both counsel in one case. Now, he has rested his case and he called the witnesses. It is the same as your calling the witnesses. Now, you can't ask me as to what you called them for.

Mr. Steffes: I would have preferred to have remained out of this proceeding, but I came here as a standby, if I might make this explanation, as I did a year ago, in the Internal Revenue matter because of Mr. Sandrich's condition of health, and I took over on a day's notice, and insofar as the depreciation is concerned, I tried to make myself clear to Mr. Sandrich that the witnesses themselves, not I as their counsel—I was told that I was appearing in this case—that is a personal privilege.

The Member: I understand that. Now, let us get to the point.

Mr. Steffes: The point is this.

The Member: What have you got to prove to prove your second point?

Mr. Steffes: Well, I would like to make this comment, because I [89] feel that here is a misunderstanding, that that refusal to testify or to offer evidence by these two witnesses goes to the question of depreciation as well as the question of depletion, and I make that with all due respect to the Court, having a personal knowledge of the facts upon which that request and motion is made.

The Member: Is that all you have to say?

Mr. Steffes: On that point.

The Member: Well, I might say that you haven't shown to me that you have the slightest misunderstanding of the second point that we are concerned with in this case, which is a question of depletion.

Mr. Steffes: I didn't think we had entered it yet, your Honor. My understanding was that the witnesses were called by Mr. Sandrich on the question of depreciation, and I still feel that my recollection of the record is correct, and that during that portion of the hearing both witnesses and each of them refused to testify on their constitutional grounds. Now, if that has been disposed of, I have no alternative but to proceed with the question of depletion.

The Member: What do you understand you have got to prove? Tell me what you have got to prove.

Mr. Steffes: On which point?

The Member: On the question of depletion.

Mr. Steffes: On the question of depletion, I understand that we have to prove numerous items going into the question, one of which, for instance, is the cost price to the corporation of the mining properties which it acquired.

The Member: The cost price.

Mr. Steffes: That was explained to me during probably a three or four hour session by Mr. Hanson, the engineer who was here yesterday, by [90] Mr. Wells—I subsequently found his name—the auditor, and by Mr. Evans, the special agent of the Internal Revenue Department, who came to my office in Las Vegas to discuss this precise point of depreciation.

The Member: Who is your witness to prove the cost or value? Who have you got here in the court room to prove it?

Mr. Steffes: The witness to prove the cost are the records of the corporation which Mr. Sandrich has here or can produce within probably ten minutes—his office is only a couple of blocks from here—showing the determination, a prior determination of that cost upon two occasions.

The Member: That has nothing to do with this. You are trying a law suit.

Mr. Steffes: Yes, your Honor.

The Member: What is done elsewhere has nothing to do with this. You are trying it right in this court room.

Mr. Steffes: But there is one question as a lawyer, practicing before the District Court, and

I read the rules that this Board follows, the rules of the District Court of the District of Columbia, that the doctrine, for instance, of estoppel applies, and I had that particular point raised in the face of opposition and was upheld on that point, and that is our position.

The Member: Have you got anything more?

Mr. Tonjes: I have nothing further, your Honor, no, sir.

The Member: Have you got anything, Mr. Sandrich?

Mr. Sandrich: Nothing, your Honor, except that I am making the offer to bring the rest of my records, my audit records of the Chiquita Mining Company, Limited, and offer them in toto.

The Member: You can't offer records that way, Mr. Sandrich. I [91] think your difficulty, if I can be frank, is you are trying a law suit and you are a C.P.A. Now, there are ways to do these things. Cases are tried here in the same way as in the Federal District Court. They are governed by the rules of evidence. You can't just bring in a lot of documents and put them on the table.

Mr. Sandrich: Your Honor—

The Member: No, I have been pretty patient about this matter, and it seems to me that the time has come to conclude it, because I don't see where you have at all the evidence that is going to help you on the second point.

Mr. Sandrich: These documents that we speak of, your Honor, my files, my working papers cover-

ing that particular period of time do constitute the only existing record of those transactions.

Mr. Tonjes: Well, let the record show that I object to the offer as made, your Honor.

Mr. Steffes: May I cite a precedent established——

The Member: No, I am going to hear Mr. Sandrich, not you.

Mr. Sandrich: Your Honor, isn't it a fact that a C.P.A. having made a detailed audit of a concern, that his evidence and his findings are competent in evidence as to sum totals and a general exposition of the events?

Mr. Tonjes: We have no such problem before the Board. We have no accounting problem involved here.

Mr. Sandrich: We have a question of fact involved, questions which I myself, as the auditor, as a certified public accountant, went into and verified and built up my records therefrom, and it seems to me that those would be competent evidence.

The Member: If I understand your second point, I will explain it to you, as to what I think is the point. Now, the Government has said that you [92] must take the same basis for depletion that the previous owners of these mining claims had.

Mr. Sandrich: When you use the second person, your Honor, do you mean Chiquita Mining Company, Limited, or any corporation or any mining company?

The Member: I mean specifically this company. Now, the law provides that where properties are

transferred to a corporation for stock, and the same control and interest prevails, that then the corporation for depletion and depreciation takes the same basis as the transferor.

Mr. Sandrich: That is correct.

The Member: Now, if you do not fall within that provision, then, of course, where stock is issued the mining company, the successor company would take a basis equal to the fair market value of the property when they got it for the stock, or, in other words, the value of the stock, for the claims. Now, it seems to me the only way this point would have been proven would be to start out with your mining claims.

Mr. Sandrich: That is what I had intended to do, your Honor.

The Member: All right. Show who owned them, show the relative interests of the several people in them, produce the contract whereby these claims were to be transferred to the mining company, produce your stock books and show what stock was issued, show the minutes giving the details of the transaction, and what not, and if that did not bring you within this restricted position, then you would prove your values here as a basis for depreciation, which would have to be a new basis, then, either based on the value of the claims or the cost of the stock, and the only way you could do that is to produce witnesses who know the value as of that time, the fair market value. You can't prove that by an audit you made. [93]

Mr. Sandrich: No, your Honor, but I can prove

by an audit I made the way, the manner in which and the times at which certain quantities of capital stock, as a matter of fact, all of the capital stock, were issued, and my working papers happen to be the first adequate record prepared on those, from my working papers where the entries were copied into the stock ledger and journal. Now, as to valuation, Mr. Maxfield and Mr. Wilton had a very intimate knowledge of that and were parties to the transactions.

The Member: There are plenty of people. I want to know what a building was worth here in Los Angeles ten years ago. It may be that there are people who handled the deal that know, but I may go out and get a real estate man who is an authority. He can testify.

Mr. Sandrich: Well, that——

The Member: I don't care to argue indefinitely with you.

Mr. Sandrich: In that case, your Honor, wouldn't a letter from the Revenue Department in which, after examination, they had decided that those claims were worth a certain amount of money be admissible?

Mr. Tonjes: No.

The Member: It is not admissible in this tribunal. You might get Government counsel to agree with you. That is a different thing. But it has no probative weight otherwise.

Well, we will close the record and I will allow the parties thirty days to file a memorandum in support of their position.

(Hearing concluded.) [94]

Petitioner, Chiquita Mining Company, Ltd., tenders and presents the foregoing as its Statement of Evidence in this case, and prays that the same may be approved by The Tax Court of the United States and made a part of the record in this cause.

MARK J. SANDRICH, C.P.A.

756 South Broadway,
Los Angeles 14, California

A. P. G. STEFFES

1217 Foreman Building,
707 South Hill Street,
Los Angeles 14, California.

Attorneys for Petitioner.

[Endorsed]: T.C.U.S. Filed April 13, 1944. [95]

[Title of Tax Court and Cause.]

STIPULATION AND AGREEMENT TO
STATEMENT OF EVIDENCE

It Is Hereby Stipulated, by and between the parties through their respective counsel, that the foregoing Statement of Evidence constitutes a statement of all the material evidence adduced at the hearing before the above-entitled Court, and the same is approved by the undersigned as attorneys for the Petitioner on Review, and by the undersigned, J. P. Wenchel, Chief Counsel for the Bureau of Internal Revenue, as attorney for the Com-

missioner of Internal Revenue, Respondent on Review.

Dated this 13th day of April, 1944.

A. P. G. STEFFES

1217 Foreman Building
707 South Hill Street,
Los Angeles 14, California
Attorney for Petition on
Review

(s) J. P. WENCHEL

Bureau of Internal Revenue
Attorney for Respondent on
Review

MARK J. SANDRICH, C.P.A.

756 South Broadway,
Los Angeles 14, California
Of Counsel. [96]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

To the Clerk of The Tax Court of the United States:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the Petition for Review by the said Circuit Court of Appeals for the Ninth Circuit, heretofore filed by

the above-named Petitioner; and Petitioner hereby designates the same as the record on review therein:

1. Docket entries of the proceedings before the Tax Court of the United States.
2. Amended petition for redetermination.
3. Answer to amended petition for redetermination.
4. Findings of fact and opinion of The Tax Court of the United States.
5. Order of redetermination. [97]
6. Motion to reopen cause, with supporting affidavits.
7. Order denying motion to reopen cause.
8. Petition for review, by the United States Circuit Court of Appeals for the Ninth Circuit.
9. Notice of filing petition for review.
10. Statement of evidence.
11. Orders enlarging time for transmission and delivery of documents.
12. This designation of record.
13. Notice of filing this designation of record, and the admission of service thereof.

Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Ninth Circuit.

(s) A. P. G. STEFFES

1217 Foreman Building,
707 So. Hill Street,
Los Angeles 14, Calif.
Attorney for Petitioner.

MARK J. SANDRICH, C.P.A.

756 South Broadway,
Los Angeles 14, California.
Of Counsel.

Service of a copy of this designation of record is hereby admitted this 13th day of April, 1944, and agreed to.

(s) J. P. WENCHEL,

C.A.R.

Chief Counsel Bureau of In-
ternal Revenue
Attorney for Respondent

[Endorsed]: T.C.U.S. Filed April 13, 1944. [98]

The Tax Court of the United States
Washington

Docket No. 108263

CHIQUITA MINING COMPANY, LTD.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

CERTIFICATE

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 98, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 19th day of April, 1944.

B. D. GAMBLE

Clerk, The Tax Court of the
United States.

[Endorsed]: No. 10759. United States Circuit Court of Appeals for the Ninth Circuit. Chiquita Mining Company, Ltd., Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed May 1, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 10759

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CHIQUITA MINING COMPANY, LTD.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF OF PETITIONER.

A. P. G. STEFFES,
1217 Foreman Building, Los Angeles 14,
Attorney for Petitioner.

FILED

OCT. 2 . 1944

PAUL P. O'BRIEN,
CLERK



TOPICAL INDEX.

	PAGE
Statement of pleadings and facts relative to jurisdiction.....	1
Statement of case.....	3
Specification of errors.....	9

I.

The court erred in denying petitioner's motion for a continuance, particularly after the refusal of James Maxfield and Hugh Wilton to testify.....	11
The facts	11
Argument	12
Authorities	13

II.

The court erred in holding that evidence was immaterial to the effect that on two prior occasions the Internal Revenue Department had held that the cost to petitioner of the mining properties in question was \$500,000.00, and that upon each of said occasions petitioner paid an additional tax based on such determination	14
The facts	14
Argument	15

III.

Counsel for the Commissioner having agreed to the introduction of secondary evidence in lieu of certain written documents, the court erred.....	18
(A) Error in restricting proof to certain written documents..	18
Argument	20
Authorities	21
(B) Error in rejecting the secondary evidence of the attorney for petitioner.....	21
The facts	21
Argument	25
Authorities	25

(C) Error in rejecting the secondary evidence of Mark J. Sandrich, certified public accountant	26
The facts	26
Argument	30
Authorities	32
(D) Error in rejecting the books and records of petitioner in the possession of Mark J. Sandrich, certified public accountant	32
The facts	32
Argument	34
Authorities	35

IV.

The court erred in rejecting evidence on the question as to whether the Commissioner was estopped to deny the cost to petitioner of said mining claims to be \$500,000.00, by reason of two previous determinations to that effect by the Internal Revenue Department	36
The facts	36
Argument	36
Authorities	37

V.

The court erred in denying petitioner's motion to reopen this cause for the presentation of further evidence upon the issue of the allowance of a proper rate for depletion of the ores in the properties owner by the petitioner.....	38
The facts	38
Argument	38
Authorities	39
Conclusion	40

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Arine v. United States, 10 Fed. (2d) 778.....	32
Bowen v. Douglass, 2 U. S. 44, 2 Dall. 44, 1 L. Ed. 282.....	13
Brown v. United States, 142 Fed. 1.....	32
Burnet v. San Joaquin Fruit & Invest. Co., 52 Fed. (2d) 123, 10 A. F. T. R. 399.....	37
Chatham Phenix Natl. Bk. & Tr. Co. v. Helvering, 87 Fed. (2d) 547, 18 A. F. T. R. 775.....	39
Cooper v. United States, 9 Fed. (2d) 216.....	32
Corliss v. United States, 7 Fed. (2d) 455.....	21
Cub Fork Coal Co. v. Fairmont Glass Co., 19 Fed. (2d) 273....	35
Dunbar v. United States, 156 U. S. 185.....	25
E. I. Du Pont de Nemours & Co. v. Tomlinson, 296 Fed. 634....	35
Galbreath v. United States, 257 Fed. 648.....	32
Helvering v. Continental Oil Co., 68 Fed. (2d) 750, cert. den. 292 U. S. 627.....	40
Maryland Casualty Co. v. Simmons, 2 Fed. (2d) 29, cert. denied 266 U. S. 634.....	25
Massachusetts Bonding & Ins. Co. v. Norwich Pharmacal Co., 18 Fed. (2d) 934.....	35
McFaul v. Ramsey, 61 U. S. 523, 20 How. 523, 15 L. Ed. 1010	13
Myrick v. United States, 219 Fed. (1st).....	25
Pennington v. Scott, 2 U. S. 94, 2 Dall. 94, 1 L. Ed. 304.....	13
Pilson v. United States, 249 Fed. 328.....	25
Riggs v. Tayloe, 9 Wheat. 483.....	21
Robilio v. United States, 291 Fed. 975, cert. den. 263 U. S. 716	35
Schlosser v. Leshner, 1 U. S. 411, 1 Dall. 411, 1 L. Ed. 200.....	13

	PAGE
Security Tr. Co. v. Robb, 142 Fed. 78.....	21
Sprague Tire & Rubber Co., 11 B. T. A. 610.....	25
Tayloe v. Riggs, 1 Pet. 591.....	21
Thompson v. Selden, 61 U. S. 194, 20 How. 194, 15 L. Ed. 1001	13
Washburn Wire Co. v. Commissioner, 67 Fed. (2d) 658.....	40
Woods v. Young, 8 U. S. 237, 4 Cranch. 237, 2 L. Ed. 607.....	13

STATUTES.

Rules on Appeal, Rule 50.....	9
United States Codes, Annotated, Title 28, Ch. 640, Sec. 9, 49 Stat. at L. 1564.....	35

TEXTBOOKS.

Wigmore on Evidence (2d Ed. & Supp.), 1923-1933.....	21
--	----

No. 10759

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CHIQUITA MINING COMPANY, LTD.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF OF PETITIONER.

Statement of Pleadings and Facts Relative to Jurisdiction.

1. On May 1, 1941, a notice of deficiency [Tr. of Rec., pp. 11 to 21, incl.] was mailed to petitioner.
2. The taxes in controversy were income and excess profits taxes for the calendar years 1936, 1937, 1938, and 1939, in the total amount of \$11,861.65.
3. On July 29, 1941, petitioner's original petition for redetermination (not included in the record here) was filed.
4. On August 19, 1941, petitioner's amended petition for redetermination [Tr. of Rec., pp. 4 to 21] was filed.
5. On September 25, 1941, an answer [Tr. of Rec., pp. 21 to 23] was filed.

6. On August 26, 1942, pursuant to request previously made by petitioner, the hearing on the issues presented by the amended petition and answer thereto was set for October 12, 1942, at Los Angeles, California.
7. On October 14, 1942, the hearing was commenced, and completed on October 15, 1942. The matter was submitted on briefs to be filed by counsel for both parties.
8. On January 5, 1943, a memorandum opinion was rendered by the Judge who heard the matter.
9. On February 4, 1943, a motion to reopen the cause for the presentation of further evidence was filed by petitioner, together with evidence in support thereof.
10. On February 6, 1943, the motion was denied.
11. On April 8, 1943, decision under Rule 50 was entered.
12. On July 6, 1943, petition for review by the United States Circuit Court of Appeals for the Ninth Circuit with assignments of error was filed by petitioner.
13. The time of petitioner to have prepared and transmitted the record herein to the United States Circuit Court of Appeals for the Ninth Circuit having been extended by orders of said Court to May 1, 1944, said record was duly filed with the Clerk of said Court on said date.

14. The jurisdiction of the Board of Tax Appeals, now the Tax Court of the United States, to enter its decision herein, and the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit to review the decision of the Tax Court of the United States, is provided for and governed by the 1926 Revenue Act, approved February 26, 1926, as amended by the various revenue acts enacted and approved prior to the date of the filing of petitioner's petition for review herein.

Statement of Case.

In its amended petition for redetermination, petitioner contended that the determination of the tax set forth in respondent's notice of deficiency was based upon the following errors:

1. That the Commissioner erred in his computation of the cost of mining property upon which depletion is allowable.
2. That the Commissioner erred in his estimate of the usable life of machinery and equipment, upon which depreciation deduction is based.

Since the Tax Court of the United States held that the contention of petitioner on the depreciation question was correct, that issue is not here involved.

On the issue with reference to depletion, the Court held that:

"No evidence was offered on the first issue and respondent's determination on this point is consequently approved."

On the question of depletion, the ultimate fact to be determined was the cost to petitioner of certain mining properties which were conveyed to it shortly after the organization of the corporation. These properties were conveyed to the corporation by Jack H. Smith and Otto F. Schwartz in consideration of the issuance to them and to a third party of certain shares of the capital stock of petitioner. The primary question to be determined was whether the said Jack H. Smith and Otto F. Schwartz were, after the conveyance by them of these mining properties to petitioner, in as much control of petitioner's affairs as they had been in control of said mining properties prior to the conveyance of said mining properties to petitioner and the issuance of said capital stock in consideration thereof. If Jack H. Smith and Otto F. Schwartz were in as much control of petitioner's affairs after the conveyance of said mining properties and the issuance of said capital stock as they had been in control of said mining properties, then the transactions in connection therewith would not have constituted a taxable transfer, and hence, the cost to petitioner would have been deemed to be the same as the cost to the vendors, Jack H. Smith and Otto F. Schwartz. If, on the contrary, Jack H. Smith and Otto F. Schwartz were not in as much control of petitioner's affairs after the conveyance of said mining properties and the issuance of said capital stock as they had been in control of said mining properties, then the cost to petitioner would not have been deemed to be the same as the cost to the vendors, but evidence would have been admissible to show the true consideration paid by petitioner as the cost of said mining properties. Respondent had computed petitioner's tax liability on the first of these two theories.

The third party to whom we have referred above as the party to whom petitioner issued and delivered certain capital stock, was James Maxfield, doing business in the county of Clark, state of Nevada, where the mining properties were located and petitioner had its principal place of business, under the fictitious firm name and style of CHIQUITA MINE SYNDICATE.

Another most important fact which must be borne in mind is that at the time of the hearing on October 14 and 15, 1942, all agreements, written and verbal, with reference to the conveyance of said mining properties, the issuance and delivery of said capital stock, and in particular the purchase by the Chiquita Mine Syndicate of all shares of such capital stock that had been issued and delivered to Jack H. Smith and Otto F. Schwartz, had been fully executed by all parties and the full consideration for the entire transaction had been paid.

In determining the question concerning whether Jack H. Smith and Otto F. Schwartz were in as much control of petitioner's affairs after the conveyance of the mining properties and the issuance of the capital stock, as they had been in control of said mining properties before the conveyance thereof to petitioner and the issuance by petitioner of its capital stock, the first inquiry should have been the following: What percentage of the issued and outstanding capital stock of petitioner did Jack H. Smith and Otto F. Schwartz own when they conveyed the mining properties to petitioner and petitioner issued and delivered its capital stock therefor? In other words, since Jack H. Smith and Otto F. Schwartz, as owners of said mining properties, had one hundred per cent control over such mining properties, it is obvious that they would have

to have one hundred per cent, or at least fifty-one per cent or more, control, by their stock ownership, over the affairs of petitioner, in order that it could be held and determined that they were in as much control of the affairs of petitioner after the conveyance of mining properties and issuance of capital stock as they had been in control of said mining properties prior to the conveyance of the properties and the issuance of the stock.

The method of showing the control of Jack H. Smith and Otto F. Schwartz over the affairs of petitioner was and is the elementary method of showing control over the affairs of any corporation. As ordinarily happens, the right to elect a majority of the board of directors of a corporation is determined by the ownership of more than fifty per cent of the issued and outstanding capital stock of such corporation. Petitioner was prepared to show that at no time did Jack H. Smith and Otto F. Schwartz ever own more than fifty per cent of the issued and outstanding capital stock of petitioner.

This proof alone would have been sufficient, in our opinion, to have constrained the Tax Court to find that Jack H. Smith and Otto F. Schwartz were not in as much control of the affairs of petitioner after they had conveyed the mining properties to petitioner and petitioner had issued its capital stock in payment therefor, as they had been prior thereto, in control of said mining properties.

When this matter was called for trial on October 14, 1942, this was the first time that the matter had been brought on for hearing. No previous continuance had ever been granted. After the hearing had commenced, James Maxfield, one of the principals involved in the transaction wherein and whereby petitioner acquired the

mining properties in question and the party to whom petitioner issued one-half of the total number of shares of its capital stock as the consideration for the conveyance to it of said mining properties, was called as a witness by petitioner. He exercised his constitutional privilege to refuse to answer any questions put to him with reference to such transaction on the ground that his testimony might tend to incriminate him in certain criminal proceedings pending against him in the District Court of the United States, in and for the District of Nevada. Petitioner thereupon moved for a continuance of the hearing until such time as the testimony of this witness would be available. The motion for a continuance was denied.

When petitioner sought to prove the details of the transaction relative to the conveyance to petitioner of said mining properties and the issuance by petitioner of its capital stock in payment therefor, the presiding Judge of the Tax Court ruled that this could be done in only one manner, and that is by the introduction of original written agreements that had been executed by the parties to the transaction. When petitioner proceeded to make a showing to account for its inability to produce the original agreements in question, in order to introduce secondary evidence concerning the contents of said agreements, counsel for respondent interrupted and made the following statement :

“ . . . I am willing to listen to any secondary evidence he has to offer. I thought that was the purpose of Your Honor’s statement just now, to permit him to offer secondary evidence, and I see no purpose in him making this statement at this time.”

To this remark Mr. Steffes, one of counsel for petitioner, made the following reply:

“Well, the secondary evidence, may I suggest to counsel, for the enlightenment of Your Honor, would be my personal knowledge of those documents which I personally prepared and some of which, at least, I personally turned over to Mr. Crupf of the S. E. C., and by reason of which we had been unable to get the original documents or to locate where they are. The situation is this”

The Court then interrupted and a discussion concerning what petitioner had to prove in these proceedings ensued. In this discussion Mr. Sandrich, a Certified Public Accountant and one of counsel for petitioner, indicated that he desired to offer his entire audit records of petitioner as other evidence of the transaction in question. This offer was rejected, and the hearing brought to a summary close by the Judge who presided without having permitted petitioner to prove the details of the transaction by the secondary evidence of Mr. Steffes, or the secondary evidence of the Certified Public Accountant who had made a complete audit of the affairs of petitioner since its incorporation.

Thus, even though counsel for respondent had in effect stipulated to the introduction of such secondary evidence, petitioner was prevented from sustaining its burden of proof by competent evidence other than the introduction of the original agreements which petitioner was unable to produce in court.

After the memorandum opinion was rendered by the Judge who heard the matter, a motion to reopen the cause for the presentation of further evidence was filed by peti-

tioner, together with evidence in support thereof. This evidence tended to show a sufficient reason and excuse for not having presented the evidence required by the Judge on the question of depletion. No counter showing was made by respondent. The motion was denied.

Thereafter, decision under Rule 50 was entered, and within the time provided by law, petitioner filed this petition for review.

Specification of Errors.

I.

The Court erred in denying petitioner's motion for a continuance, particularly after the refusal of James Maxfield and Hugh Wilton to testify.

II.

The Court erred in holding that evidence was immaterial to the effect that on two prior occasions the Internal Revenue Department had held that the cost to petitioner of the mining properties in question was \$500,000.00, and that upon each of said occasions petitioner paid an additional tax based on such determination.

III.

Counsel for the Commissioner having agreed to the introduction of secondary evidence in lieu of certain written documents, the Court erred:

(a) In restricting the proof to such written documents:

(b) In rejecting the secondary evidence of the attorney for petitioner, concerning the consideration for said mining

properties paid by petitioner, and that *portion* of said consideration which was received by the vendors, Jack H. Smith and Otto F. Schartz, upon the question as to whether said vendors were at any time thereafter in as much control of petitioner's affairs as they had been prior to the acquisition of said properties by petitioner;

(c) In rejecting the secondary evidence of Mark J. Sandrich, C. P. A., on the same subject;

(d) In rejecting the books and records of petitioner in the possession of said Mark J. Sandrich, C. P. A., on the same subject.

IV.

The Court erred in rejecting evidence on the question as to whether the Commissioner was estopped to deny the cost to petitioner of said mining claims to be \$500,000.00, by reason of two previous determinations to that effect by the Internal Revenue Department.

V.

The Court erred in denying petitioner's motion to reopen this cause for the presentation of further evidence upon the issue of the allowance of a proper rate for depletion of the ores in the properties owned by the petitioner.

* * * * *

We shall treat each of the errors specified in the order set forth above.

I.

The Court Erred in Denying Petitioner's Motion for a Continuance, Particularly After the Refusal of James Maxfield and Hugh Wilton to Testify.

THE FACTS.

The principal question to be determined with reference to the depletion matter herein involved was the cost to petitioner of the mining properties in question. The transaction wherein and whereby petitioner acquired said mining properties involved three parties. The first party were the vendors who conveyed the properties to petitioner. The second party was petitioner, which issued five hundred thousand shares of its capital stock as the consideration for the conveyance of said mining properties. The third party was James Maxfield, doing business under the fictitious firm name and style of Chiquita Mine Syndicate, who received one-half of the consideration paid for said mining properties by petitioner.

When Mr. Maxfield was called to the witness stand, he refused to answer questions put to him on the ground that his testimony might tend to incriminate him in certain criminal proceedings pending in the United States District Court, in and for the District of Nevada. [Tr. of Rec., pp. 75 to 80.]

Mr. Hugh Wilton, who was associated with Mr. Maxfield in the financing of petitioner, likewise refused to testify on the same ground. [Tr. of Rec., pp. 81 to 83.]

ARGUMENT.

One of the subordinate questions essentially connected with the question of the nature and extent of the control exercised by Jack H. Smith and Otto F. Schwartz over the affairs of petitioner after it had acquired said mining properties, was whether Jack H. Smith and Otto F. Schwartz had acquired sufficient shares of the capital stock of petitioner to elect a majority of its board of directors. The answer to this question depended upon the proportion of such stock which Jack H. Smith and Otto F. Schwartz received out of the total issued and outstanding shares of the capital stock of petitioner. If the Chiquita Mine Syndicate received one-half of such issued and outstanding shares and later acquired the remaining one-half of said shares, then Jack H. Smith and Otto F. Schwartz never did own a sufficient number of the issued and outstanding shares of the capital stock of petitioner to be able to elect a majority of its board of directors, in order thereby to control its affairs.

Obviously, James Maxfield, as the Chiquita Mine Syndicate, was a competent witness to testify concerning his ownership of shares of the capital stock of petitioner, and the time when and parties from whom he had acquired such shares of petitioner's capital stock. When the presiding Judge denied the motion for a continuance after the refusal of these two witnesses to testify, he thereby prevented petitioner from presenting competent evidence from which the Court could have determined that the

transaction wherein petitioner acquired said mining properties was not a nontaxable transfer. This error on the part of the Court was rendered more prejudicial in view of the Court's subsequent refusal to permit the introduction of secondary evidence in lieu of certain written agreements, and its action in restricting the proof to such written instruments, which petitioner was unable to produce at the hearing.

AUTHORITIES.

Continuances are within the discretion of the trial court.

Woods v. Young, 8 U. S. 237, 4 Cranch. 237, 2 L. Ed. 607;

Thompson v. Selden, 61 U. S. 194, 20 How. 194, 15 L. Ed. 1001;

McFaul v. Ramsey, 61 U. S. 523, 20 How. 523, 15 L. Ed. 1010.

It is only necessary for a party to show due diligence to entitle him to a continuance.

Pennington v. Scott, 2 U. S. 94, 2 Dall. 94, 1 L. Ed. 304.

A party may have a continuance on showing reasonable cause.

Schlosser v. Leshner, 1 U. S. 411, 1 Dall. 411, 1 L. Ed. 200;

Bowen v. Douglass, 2 U. S. 44, 2 Dall. 44, 1 L. Ed. 282.

II.

The Court Erred in Holding That Evidence Was Immaterial to the Effect That on Two Prior Occasions the Internal Revenue Department Had Held That the Cost to Petitioner of the Mining Properties in Question Was \$500,000.00, and That Upon Each of Said Occasions Petitioner Paid an Additional Tax Based on Such Determination.

THE FACTS.

At the hearing, petitioner desired and attempted to show that on two prior occasions the Internal Revenue Department of the United States had determined and held that the cost price to petitioner of the mining properties in question was \$500,000.00. This determination of said cost price was made for the purpose of ascertaining the proper amount of tax and penalty which should be paid by petitioner as the result of this precise transaction. In the first instance petitioner had paid the documentary stamp tax (due on the issuance of shares of its capital stock) on only those shares for which certificates had actually been issued and delivered. These amounted to approximately 135,000 or 140,000 shares. In May, 1933, the Collector of Internal Revenue in Nevada contended that in contemplation of law the entire purchase price of 500,000 shares of its capital stock was deemed issued and delivered when the mining properties were conveyed to petitioner, notwithstanding the fact that certificates representing all of said 500,000 shares of stock were not issued at the same time. At that time petitioner paid a deficiency documentary stamp tax on the balance of the 500,000 shares for which certificates had not previously been issued, and also paid a penalty.

In the second instance, the value of these shares which were given as the cost price of the mining properties was definitely fixed by the government at \$500,000.00. On this occasion the question arose as to the documentary stamp tax that should be affixed by petitioner to the deeds which conveyed certain of these mining properties to petitioner. At that time, in July, 1934, petitioner paid an additional documentary stamp tax based upon the theory of the Internal Revenue Department that the consideration paid by petitioner for the mining properties was \$500,000.00, the par value of the 500,000 shares which were issued by petitioner as the consideration for its acquisition of the mining properties. [Tr. of Rec., pp. 59 to 61.]

ARGUMENT.

When we consider that one of the most important questions to be determined in this matter of depletion, was whether the transaction in which petitioner acquired these mining properties was a taxable or non-taxable transaction, the materiality and relevancy of this proffered evidence becomes immediately apparent. When counsel for petitioner indicated that they intended to submit this evidence, the presiding Judge made the statement:

“I think all that is utterly immaterial.”

He later added:

“We have no information, nor are we the slightest bit concerned with what the Bureau of Internal Revenue has done in the past. We are trying your case just like you are entering into the Federal District Court to try it, and we have none of the records, none of the information; only this determination.”

Counsel for petitioner then remarked:

“Well, we had intended to supply that information in the form of legal evidence.” [Tr. of Rec., p. 61.]

As we shall show hereafter, the presiding Judge seemed to feel and indicated that the cost to petitioner of the mining properties in question could be shown in only *one* way, that is, by the introduction into evidence of certain written agreements which had been executed at the time of and subsequently to the acquisition of the mining properties by petitioner.

When the Internal Revenue Department, in the second instance mentioned above, required petitioner to pay a deficiency documentary stamp tax with reference to the stamps to be affixed to the deeds which conveyed the mining properties to petitioner, it directly determined the question whether the transaction was a taxable or non-taxable transaction. It also directly determined the question whether the cost to petitioner of said mining properties was deemed to be the cost of said properties to the original vendors, Jack H. Smith and Otto F. Schwartz.

It must be borne in mind that in the present proceedings, respondent has contended that the transaction in question was a non-taxable transaction and therefore that the consideration paid by petitioner should be deemed to be the same as that which was originally paid by said vendors.

However, on the previous occasion last above mentioned, the Bureau of Internal Revenue held that the consideration paid by petitioner was deemed to be \$500,000.00. Consequently, we feel that petitioner had the right to set

up the sum of \$500,000.00 as the cost price to it of the mining properties in question for the purpose of establishing a cost depletion rate.

Although we felt that we were entirely justified in setting up the sum of \$500,000.00 as the cost price of the mining properties, we were willing to adjust this figure, which represented the par value of 500,000 shares, to the actual consideration in cash which had passed in and as the result of the transaction. We therefore were willing to fix the cost price at \$100,000.00. This was equal to the following cash items: the sum of \$87,500.00, which was the amount in cash paid by Chiquita Mine Syndicate for the 250,000 shares of petitioner's stock which had originally been issued to Jack H. Smith and Otto F. Schwartz; the sum of \$10,000.00 paid by petitioner to one Robbins from whom Jack H. Smith and Otto F. Schwartz had obtained two of the mining properties under a lease with option to purchase; and the sum of \$2500.00, which petitioner had paid out in defending and protecting the mining properties from adverse claimants.

As shown in our petition for review [Tr. of Rec., p. 37], the proper assessment should be \$1806.55 instead of \$7,229.04, as assessed by the Commissioner.

Although respondent will argue that the doctrine of estoppel does not apply to the Internal Revenue Department, we nevertheless contend that the determination of the Internal Revenue Department in the proceedings where the cost price to petitioner was *directly* involved should now be followed where that cost price is only *indirectly* involved in fixing an income tax to be paid by petitioner. (See authorities cited under Point IV.)

III.

Counsel for the Commissioner Having Agreed to the Introduction of Secondary Evidence in Lieu of Certain Written Documents, the Court Erred:

(A) In Restricting the Proof to Such Written Documents;

(B) In Rejecting the Secondary Evidence of the Attorney for Petitioner, Concerning the Consideration for Said Mining Properties Paid by Petitioner, and That Portion of Said Consideration Which Was Received by the Vendors, Jack H. Smith and Otto F. Schwartz, Upon the Question as to Whether Said Vendors Were at Any Time Thereafter in as Much Control of Petitioner's Affairs as They Had Been Prior to the Acquisition of Said Properties by Petitioner;

(C) In Rejecting the Secondary Evidence of Mark J. Sandrich, C. P. A., on the Same Subject;

(D) In Rejecting the Books and Records of Petitioner in the Possession of Said Mark J. Sandrich, C. P. A., on the Same Subject.

(A) Error in Restricting Proof to Certain Written Documents.

During the hearing, the following colloquy took place among the presiding Judge and counsel for petitioner and respondent:

“Mr. Steffes: I would like to make a showing as the reason for the absence of documentary testimony at this time—well, I would like to make that showing so as to lay the foundation for the production of secondary evidence in lieu of such primary evidence.

The Member: Well, what are you going to do? Go ahead.

Mr. Steffes: In this matter, if the Court please, for a period of approximately 18 months, all of the books and records of the corporation and all of the audit figures, the audit spreads and records of Mr. Sandrich were made (available) to Mr. Crupf of the S. E. C. I didn't know until about six months after his death—the investigation suddenly stopped and about six months later I found out that he had died. He died about a year ago. By reason of that fact I personally know—

Mr. Tonjes: If Your Honor please, I object to the witness' or counsel's statement as not being material to the proceedings here. I am willing to listen to any secondary evidence he has to offer. I thought that was the purpose of Your Honor's statement just now, to permit him to offer secondary evidence, and I see no purpose in him making this statement at this time.

Mr. Steffes: Well, the secondary evidence, may I suggest to counsel, for the enlightenment of Your Honor, would be my personal knowledge of those documents which I personally prepared and some of which, at least, I personally turned over to Mr. Crupf of the S. E. C., and by reason of which we have been unable to get the original documents or to locate where they are. The situation is this—" [Tr. of Rec., pp. 97 and 98.]

At this point counsel for petitioner was interrupted by the presiding Judge and a discussion then ensued concerning the proof that petitioner was required to make in these proceedings.

The following portion of the statement made by counsel for respondent definitely amounts to an agreement or stipulation that petitioner be permitted to introduce secondary evidence in lieu of the written agreements that were not available:

“I am willing to listen to any secondary evidence he has to offer. I thought that was the purpose of Your Honor’s statement just now to permit him to offer secondary evidence, and I see no purpose in him making this statement at this time.” [Tr. of Rec., p. 98.]

ARGUMENT.

Despite this agreement to permit secondary evidence, petitioner, as we shall hereinafter show, was prevented from introducing such secondary evidence in the form of testimony of its attorney, testimony of the Certified Public Accountant who made a complete audit of all its books and records, and the books and records of petitioner which had been set up as the permanent records of the corporation.

The error of the presiding Judge relative to our claim that he restricted petitioner to the proof of certain written instruments follows from the consideration of the entire record in this case. In other words, when we realize that every other avenue of proof was closed to petitioner, then it is quite obvious that the presiding Judge unduly and erroneously restricted petitioner in its proof.

AUTHORITIES.

The production of an original document is dispensed with where it cannot be produced because it is destroyed or lost, or cannot be found by search, or is otherwise unavailable.

Wigmore on Evidence (2nd Ed.), & Supp., 1923-1933;

Riggs v. Tayloe, 9 Wheat. 483;

Tayloe v. Riggs, 1 Pet. 591;

Security Tr. Co. v. Robb, 142 Fed. 78;

Corliss v. U. S., 7 Fed. (2d) 455.

**(B) Error in Rejecting the Secondary Evidence of the
Attorney for Petitioner.**

THE FACTS.

In the course of the examination of the attorney for petitioner by Mark J. Sandrich, counsel for petitioner, the questioning was interrupted by the discussion which took place following an objection to a question propounded to the witness by counsel for respondent. That discussion is set forth at length on pages 92 to 95 of the transcript of record.

In this discussion the Court clearly indicated that it would not permit oral testimony as to the transaction which was covered by a written contract unless a showing was first made which would entitle petitioner to use secondary evidence. We refer to the following statement of the Court:

“I don’t see where you are going to produce oral testimony as to a transaction that was covered by a

written contract unless you first make that showing which would entitle you to use secondary evidence.”
[Tr. of Rec., p. 94.]

Previously, the Court had asked the following question after an objection was made by counsel for respondent to a certain question asked of the attorney for petitioner:

“What are you trying to get, what point, with this witness?”

Counsel for petitioner, who was interrogating the witness, then answered:

“I am trying to establish the fact that this witness knows of his own knowledge certain elements of the agreements and actual occurrences in connection with the transfer of properties to Chiquita Mining Company, Limited, and the issuance of its stock for those properties that result in the owners of the properties not being in control of the corporation after such transfer.”

The following discussion then took place:

“The Member: I take it the transaction was in writing. That is, a transaction certainly conveying the mining claims would be.

Mr. Sandrich: Yes, Your Honor.

The Member: And I suppose the agreement to transfer to the corporation for shares of stock was in writing?

Mr. Sandrich: There were a number of agreements. There seemed to have been some confusion in the early stages of the game, Your Honor, and it appears that a number of the matters were handled

in a manner not contemplated or not desired by the parties, and a great number of adjustment, amendments and substitutions were made which result in a very complicated mess, to use that word. Now, Your Honor remarked a while ago that Your Honor was interested in the broad aspects of the thing and was not much concerned with the details but wanted enough to show whether or not this situation resulted in the original owners of the mining claims having the control of the corporation after such transfer.

The Member: But it has got to be in a legal way.

Mr. Sandrich: I am trying to do it in a legal way, Your Honor. I am trying to question this witness.

The Member: The way to do its to first introduce the contracts, put people on the stand to identify them, bring out the minutes of the corporation, if you have anybody who was actually a party to the contract to explain it, bring them and put them on the stand.

Mr. Sandrich: Those are in existence, Your Honor, but they are not in court. Some of those records are in Nevada. Some of those records are in the hands of the Treasury Department, and I believe some of them are in the hands of the S. E. C.

The Member: They all can be reached by a subpoena, anywhere in the United States.

Mr. Sandrich: May we have sufficient time in which to secure those records?

The Member: This is your day in court.

Mr. Sandrich: Well, it seems that if we haven't got the records we haven't got a chance to secure the records, and if Your Honor won't permit our oral testimony" [Tr. of Rec., pp. 92 to 94.]

It was at this point that the Court made the following observation:

“I don’t see where you are going to produce oral testimony as to a transaction that was covered by a written contract unless you first make that showing which would entitle you to use secondary evidence.” [Tr. of Rec., p. 94.]

Later on counsel for petitioner did proceed to make a showing which would entitle petitioner to introduce secondary evidence. It was while that showing was being made that counsel for respondent objected to its continuance and indicated acquiescence in the introduction of secondary evidence.

When, however, counsel for petitioner indicated, both to the Court and counsel for respondent, that the secondary evidence sought to be introduced would be his personal knowledge of the documents which he personally prepared, he was interrupted by the Court, and an entirely different subject was injected by the Court into the proceedings at this point.

After both counsel for petitioner had attempted to introduce other secondary evidence, the hearing was summarily closed by the presiding Judge without the petitioner having rested its case. The Court concluded the hearing with the following statement:

“Well, we will close the record and I will allow the parties thirty days to file a memorandum in support of their position.” [Tr. of Rec., p. 106.]

ARGUMENT.

The error in not permitting the secondary evidence of the attorney for petitioner arises from the interruption of the proof which counsel for petitioner indicated he was about to offer, the diverting of the proof to other sources of secondary evidence, and the summary termination of the hearing without permitting petitioner to offer the secondary evidence of its attorney, who had prepared certain of the documents which were not available at the time.

However, in the light of the Court's ruling, which we shall discuss under Point (C) and (D) hereinafter, it is obvious that had a direct ruling been requested of the Court concerning the secondary evidence of the attorney for petitioner, an adverse ruling would have been expressed, as it now must be implied from the proceedings that were had.

AUTHORITIES.

Where production of the original writing cannot be obtained, resort may be had to secondary evidence.

Dunbar v. U. S., 156 U. S. 185;

Myrick v. U. S., 219 Fed. (1st);

Pilson v. U. S., 249 Fed. 328;

Maryland Casualty Co. v. Simmons, 2 Fed. (2d) 29; cert. denied 266 U. S. 634.

See, also:

Sprague, Tire & Rubber Co., 11 B. T. A. 610.

(C) Error in Rejecting the Secondary Evidence of Mark J. Sandrich, Certified Public Accountant.

THE FACTS.

After the presiding Judge had diverted the trend of the hearing as indicated in the discussion under the preceding point, he asked:

“Have you got anything more?”

The following colloquy then took place:

“Mr. Tonjes: I have nothing further, Your Honor, no, sir.

The Member: Have you got anything, Mr. Sandrich?

Mr. Sandrich: Nothing, Your Honor, except that I am making the offer to bring the rest of my records, my audit records of the Chiquita Mining Company, Limited, and offer them *in toto*.

The Member: You can't offer records that way, Mr. Sandrich. I think your difficulty, if I can be frank, is you are trying a law suit and you are a C. P. A. Now, there are ways to do these things. Cases are tried here in the same way as in the Federal District Court. They are governed by the rules of evidence. You can't just bring in a lot of documents and put them on the table.

Mr. Sandrich: Your Honor—

The Member: No, I have been pretty patient about this matter, and it seems to me that the time has come to conclude it, because I don't see where you have at all the evidence that is going to help you on the second point.

Mr. Sandrich: These documents that we speak of, Your Honor, my files, my working papers covering

that particular period of time do constitute the only existing record of those transactions.

Mr. Tonjes: Well, let the record show that I object to the offer as made, Your Honor.

Mr. Steffes: May I cite a precedent established—

The Member: No, I am going to hear Mr. Sandrich, not you.

Mr. Sandrich: Your Honor, isn't it a fact that a C. P. A. having made a detailed audit of a concern, that his evidence and his findings are competent in evidence as to sum totals and a general exposition of the events.

Mr. Tonjes: We have no such problem before the Board. We have no accounting problem involved here.

Mr. Sandrich: We have a question of fact involved, questions which I myself, as the auditor, as a certified public accountant, went into and verified and built up my records therefrom, and it seems to me that those would be competent evidence.

The Member: If I understand your second point, I will explain it to you, as to what I think is the point. Now, the Government has said that you must take the same basis for depletion that the previous owners of these mining claims had.

Mr. Sandrich: When you use the second person, Your Honor, do you mean Chiquita Mining Company, Limited, or any corporation or any mining company?

The Member: I mean specifically this company. Now, the law provides that where properties are transferred to a corporation for stock, and the same control and interest prevails, that then the corporation for depletion and depreciation takes the same basis as the transferor.

Mr. Sandrich: That is correct.

The Member: Now, if you do not fall within that provision, then, of course, where stock is issued the mining company, the successor company would take a basis equal to the fair market value of the property when they got it for the stock, or, in other words, the value of the stock, for the claims. Now, it seems to me the only way this point would have been proven would be to start out with your mining claims.

Mr. Sandrich: That is what I had intended to do, Your Honor.

The Member: All right. Show who owned them, show the relative interests of the several people in them, produce the contract whereby these claims were to be transferred to the mining company, produce your stock books and show what stock was issued, show the minutes giving the details of the transaction, and what not, and if that did not bring you within this restricted position, then you would prove your values here as a basis for depreciation, which would have to be a new basis, then, either based on the value of the claims or the cost of the stock, and the only way you could do that is to produce witnesses who know the value as of that time, the fair market value. You can't prove that by an audit you made.

Mr. Sandrich: No, Your Honor, but I can prove by an audit I made the way, the manner in which and the times at which certain quantities of capital stock, as a matter of fact, all of the capital stock, were issued, and my working papers happen to be the first adequate record prepared on those, from my working papers where the entries were copied into the stock ledger and journal. Now, as to valuation,

Mr. Maxfield and Mr. Wilton had a very intimate knowledge of that and were parties to the transactions.

The Member: There are plenty of people. I want to know what a building was worth here in Los Angeles ten years ago. It may be that there are people who handled the deal that know, but I may go out and get a real estate man who is an authority. He can testify.

Mr. Sandrich: Well, that—

The Member: I don't care to argue indefinitely with you.

Mr. Sandrich: In that case, Your Honor, wouldn't a letter from the Revenue Department in which, after examination, they had decided that those claims were worth a certain amount of money, be admissible?

Mr. Tonjes: No.

The Member: It is not admissible in this tribunal. You might get Government counsel to agree with you. That is a different thing. But it has no probative weight otherwise.

Well, we will close the record and I will allow the parties thirty days to file a memorandum in support of their position." [Tr. of Rec., pp. 103-106.]

It was at this point that the hearing was concluded.

The following three remarks made by Mr. Sandrich, the certified public accountant, show the offer made by him to testify concerning the precise question in dispute:

"Your Honor, isn't it a fact that a C. P. A. having made a detailed audit of a concern, that his evidence and his findings are competent in evidence as to sum totals and a general exposition of the events?"

“We have a question of fact involved, questions which I myself, as the auditor, as a certified public accountant, went into and verified and built up my records therefrom, and it seems to me that those would be competent evidence.”

“No, Your Honor, but I can prove by an audit I made the way, the manner in which and the times at which certain quantities of capital stock, as a matter of fact, all of the capital stock, were issued, and my working papers happen to be the first adequate record prepared on those, from my working papers where the entries were copied into the stock ledger and journal. Now, as to valuation, Mr. Maxfield and Mr. Wilton had a very intimate knowledge of that and were parties to the transactions.” [Tr. of Rec., pp. 104-106.]

ARGUMENT.

When we consider that one of the principal questions to be answered was the number of shares of its capital stock that petitioner had issued for the mining properties in question, the parties to whom said stock had been issued and the proportion of the stock thus representing the cost price of the mining properties to petitioner, to the total number of outstanding shares of the capital stock of petitioner at the time of the transaction in question, then it becomes self-evident that this proffered testimony on the part of the certified public accountant who had made a complete audit of all the book, records and affairs of the corporation from the time of its organization, was competent to prove the result of that audit with reference to the specific details under consideration.

Certainly he was a competent witness to testify concerning what his audit had disclosed with reference to the number of shares of the capital stock of petitioner that Jack H. Smith and Otto F. Schwartz had received as their share of the cost price paid by petitioner for the mining properties conveyed to it by them. The witness was also competent to testify concerning the number of shares of the capital stock of petitioner that the Chiquita Mine Syndicate had received. The witness was eminently qualified to testify concerning what proportion of the outstanding capital stock of petitioner the said Jack H. Smith and Otto F. Schwartz owned at any time after the organization of the corporation, and particularly at the time of, and after, the conveyance by them of the mining properties to petitioner. The witness was best qualified to give his expert testimony concerning what his audit had disclosed with reference to the stock control of the corporation from the time shares of stock were first issued by petitioner.

Instead of rejecting this evidence, it would seem that both counsel for respondent and the Court should have welcomed it.

As Mr. Sandrich himself suggested to the Court, the present situation is clearly one which falls within the rule that a qualified auditor and certified public accountant can testify concerning the totals of numerous items which he has obtained after a careful and complete examination and audit of the records reflecting such items. We believe that this contention on our part is so reasonable and unanswerable that we shall not argue the point further.

AUTHORITIES.

The testimony of the certified public accountant who made a complete examination of the books and records of petitioner, with reference to the results of said examination and audit, was competent evidence.

Brown v. U. S., 142 Fed. 1;

Galbreath v. U. S., 257 Fed. 648;

Cooper v. U. S., 9 Fed. (2d) 216;

Arine v. U. S., 10 Fed. (2d) 778.

(D) Error in Rejecting the Books and Records of Petitioner in the Possession of Mark J. Sandrich, Certified Public Accountant.

THE FACTS.

We have already quoted that portion of the record wherein Mark J. Sandrich, the certified public accountant, offered to testify concerning the result of his examination and audit with reference to pertinent and relevant matters disclosed by the books of the corporation. Mr. Sandrich expressly made the offer to bring the entire audit records of petitioner into court and to introduce them *in toto*. This offer was refused. Previously in the examination of the attorney for petitioner, the following foundation was laid for the introduction of the records which had been prepared by the certified public account for petitioner:

“Q. (By Mr. Sandrich) At any time during your representation of the company were you charged with the duty of retaining the services of a certified public accountant? A. (By Mr. Steffes) I was.

Q. And for what purpose, please? A. We had certain litigation pending in the 8th Judicial District Court of the State of Nevada, in and for the County of Clark, on a mandamus proceeding, brought by a

stockholder or a small group of stockholders, and at that time I stated to the court that a complete audit would be made by a certified public accountant of all of the books and records of the corporation from the time the corporation first formed and took over the properties, up until the—up until that time or at the end of the taxable year, which was, I believe, December 31, 1938.

Q. Did you obtain the services of such an accountant? A. I did.

Q. And who was he, please? A. Mark J. Sandrich, a certified public accountant, in Los Angeles, California.

Q. Did you instruct the certified public accountant with regard to what you wanted him to do? A. I did.

Q. Will you kindly repeat the instructions that you gave him?

Mr. Tonjes: May I ask the purpose of this line of questioning, Your Honor? I think it would be pertinent.

Mr. Sandrich: Yes, Your Honor. I have explained before that the company had no books and records. What I am leading up to is an offer of my audit records of that period as the records of the corporation.

The Member: Well, as I understand the question, on the point that is being tried, of the rate of depreciation on certain mining machinery and equipment, the parties are in agreement on the cost; the question is, what is the life? I can't see where a lot of this testimony is relevant.

Mr. Sandrich: There seems to have been some difference of opinion, Your Honor, or at least difficulty regarding amounts and dates and quantities.

and I wanted my records here for the benefit of counsel for respondent and myself.

The Member: Well, it seems to me it would be very doubtful whether it is admissible, but I would have to reserve that until it is offered and see just exactly how it is offered." [Tr. of Rec., pp. 71-73.]

ARGUMENT.

The records which Mr. Sandrich desired and attempted to introduce into evidence were actually the then permanent records of petitioner relating to the early affairs of petitioner, particularly at the time of the transaction wherein and whereby petitioner acquired the mining properties which produced the income on which the tax was levied. As he stated, at first the corporation had no formal set of books; but after he made his audit, this audit spread was retained as part of the permanent records of the corporation, for all transactions which had occurred prior to Mr. Sandrich having set up a more formal and elaborate set of books and records.

Had he been permitted to testify, then counsel for respondent could easily have verified every single item concerning which he testified from the records that he offered to produce in court. From these records the witness could have traced each item to its original source, and could have identified the shares of stock that had been issued as the cost price of the mining properties acquired by petitioner.

This assignment of error relative to the rejection of the books and records of petitioner, as evidence, as well as the rejection of the testimony of Mr. Sandrich, discussed under the preceding point, is predicated on the premise that counsel for respondent had waived all objection to secondary evidence. In making this statement,

we are not receding from our position, however, that the books and records offered by Mr. Sandrich were in fact primary evidence.

It is difficult for us to understand how these books and records could properly be excluded. The only possible theory for excluding them would be that the proof should be restricted to certain written agreements which petitioner was unable to produce at the hearing. That theory, however, is neither proper, legal, just, nor equitable. It demonstrates also what we have contended before—that the rulings of the Court considered as a whole clearly showed that the proof in this case was unduly restricted to those written instruments, and that in thus restricting the proof, the learned trial Judge erred.

AUTHORITIES.

The modern rule is that practically any regular entry or record properly verified, including a subsidiary slip, memorandum or note, is admissible.

Robilio v. U. S., 291 Fed. 975; Cert. Denied, 263 U. S. 716;

E. I. Du Pont de Nemours & Co. v. Tomlinson, 296 Fed. 634;

Massachusetts Bonding & Ins. Co. v. Norwich Pharmacal Co., 18 Fed. (2d) 934;

Cub Fork Coal Co. v. Fairmont Glass Co., 19 Fed. (2d) 273.

In 1936, Congress, acting upon the recommendation of the Attorney General, passed an act adopting the liberal rule for the introduction of records, for all federal courts.

28 U. S. C. A. (June 20, 1936), c. 640, Sec. 9, 49 Stat. L. 1564.

IV.

The Court Erred in Rejecting Evidence on the Question as to Whether the Commissioner Was Estopped to Deny the Cost to Petitioner of Said Mining Claims to Be \$500,000.00, by Reason of Two Previous Determinations to That Effect by the Internal Revenue Department.

THE FACTS.

We have already shown the manner in which the Internal Revenue Department on two previous occasions determined the consideration that had been paid by petitioner as the cost price of the mining properties which it acquired.

ARGUMENT.

As we argued above, when the Internal Revenue Department made its previous inquiries and determinations, it was then making a direct determination on each occasion with reference to the consideration paid by petitioner for said mining property.

In the present inquiry, which involves a permissible deduction in the ascertainment of the amount of income received by petitioner upon which it was obligated to pay an income tax, such determination of the cost price to petitioner of the mining properties is more indirect.

Certainly, if petitioner had adopted the government's theories on these previous occasions (which in fact it did), it would not be in a favorable position if it now attempted

to repudiate such position upon which its former tax, on two occasions, was based.

Had these previous matters been determined after a court hearing, and had the determinations been made by the Court instead of by the Internal Revenue Department, the matter would have become *res adjudicata*, and there would have arisen against respondent an estoppel by judgment. In the absence of such judgment, there should, however, be an estoppel *in pais*.

The doctrine of estoppel has thus been expressed:

“Whoever has by any declaration, act or omission deliberately and intentionally led another to believe a certain thing to be true, and to act upon such belief, in any litigation arising out of such declaration, act or omission, he shall not be permitted to falsify it.”

AUTHORITIES.

The doctrine of estoppel can be invoked in matters of tax liability.

Burnet v. San Joaquin Fruit & Invest. Co., 52
Fed. (2d) 123, 10 A. F. T. R. 399.

V.

The Court Erred in Denying Petitioner's Motion to Reopen This Cause for the Presentation of Further Evidence Upon the Issue of the Allowance of a Proper Rate for Depletion of the Ores in the Properties Owned by the Petitioner.

THE FACTS.

After the trial Judge in his memorandum opinion had held that respondent's determination on the issue of depletion should be approved for the reason that no evidence was offered on that issue, petitioner moved the Court to reopen the cause for the presentation of further evidence upon the issue of the allowance of a proper rate for depletion of the ores in the properties owned by petitioner.

This motion was supported by three affidavits, which are set forth at length on pages 28 to 32 of the transcript of record. The affidavits clearly showed a sufficient justification or excuse for not having produced the documentary evidence to which the trial judge had obviously restricted the proof.

ARGUMENT.

The question presented under this point involves a determination as to whether the trial judge properly exercised the discretion that was vested in him.

Counsel for petitioner had explained the absence of the written agreements in that they had previously been delivered to the Treasury Department and to the S. E. C., and that counsel for petitioner had been unable to get hold of them. [Tr. of Rec., p. 80.]

In view of the fact that the trial judge so strongly insisted that the question of the vendors' control of the affairs of petitioner after the mining properties had been conveyed to petitioner be proved exclusively by these written contracts, a reasonable opportunity should have been accorded petitioner to produce the desired evidence.

We sincerely feel that since the Court did not permit the introduction of secondary evidence even after counsel for respondent had consented thereto, as we pointed out above, it abused its discretion in not granting this motion of petitioner to reopen the cause for the purpose of obtaining and introducing the written contracts in question.

The collection of income taxes, though important, does not necessitate such quick action as would deprive a taxpayer of his day in court. This should be particularly true since petitioner had voluntarily paid an additional income tax of \$7,000.00 after Mr. Sandrich was retained to make a complete audit of the affairs of the corporation and to do whatever was necessary to be done to disclose any additional tax liability. [Tr. of Rec., p. 70.]

AUTHORITIES.

In the case of *Chatham Phenix Natl. Bk. & Tr. Co. v. Helvering*, 87 Fed. (2d) 547, 18 A. F. T. R. 775, it was held that where it appeared that the petitioner had been represented before the Board of Tax Appeals by a person so unfamiliar with the Board's procedure and the facts of the case that the issue was not made clear, and there were

present other unusual and unfortunate circumstances, the Board should have reopened the case in the promotion of justice.

See, also:

Washburn Wire Co. v. Commissioner, 67 Fed. (2d) 658;

Helvering v. Continental Oil Co., 68 Fed. (2d) 750; Cert. Denied, 292 U. S. 627.

Conclusion.

From what has been said above, we believe that it has been sufficiently demonstrated that petitioner could have proved by competent evidence that the vendors, Jack H. Smith and Otto F. Schwartz, were not in as much control of the affairs of petitioner after petitioner had acquired the mining properties in question as they were prior thereto. Furthermore, if it was proper to restrict the proof to the written contracts, which had already been fully executed by all parties, then a reasonable opportunity should have been afforded petitioner to obtain and introduce these contracts.

Under all the circumstances of the case, we feel that it would be just and equitable to permit a further hearing on the issue of depletion, and that the trial judge's determination on that issue should be reversed for the purpose of having a full hearing thereon.

Respectfully submitted,

A. P. G. STEFFES,

Attorney for Petitioner.

No. 10759

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

3

CHIQUITA MINING COMPANY, LTD.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING.

A. P. G. STEFFES,
1217 Foreman Building, Los Angeles 14,
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TOPICAL INDEX.

PAGE

I.

Petitioner has not had the benefit of this court's analysis and determination of the precise contentions urged by petitioner, and as urged by petitioner, for a reversal of the decision of the Tax Court of the United States.....	3
---	---

II.

This honorable court has inadvertently overlooked certain most essential phrases of the evidence and the record.....	6
--	---

III.

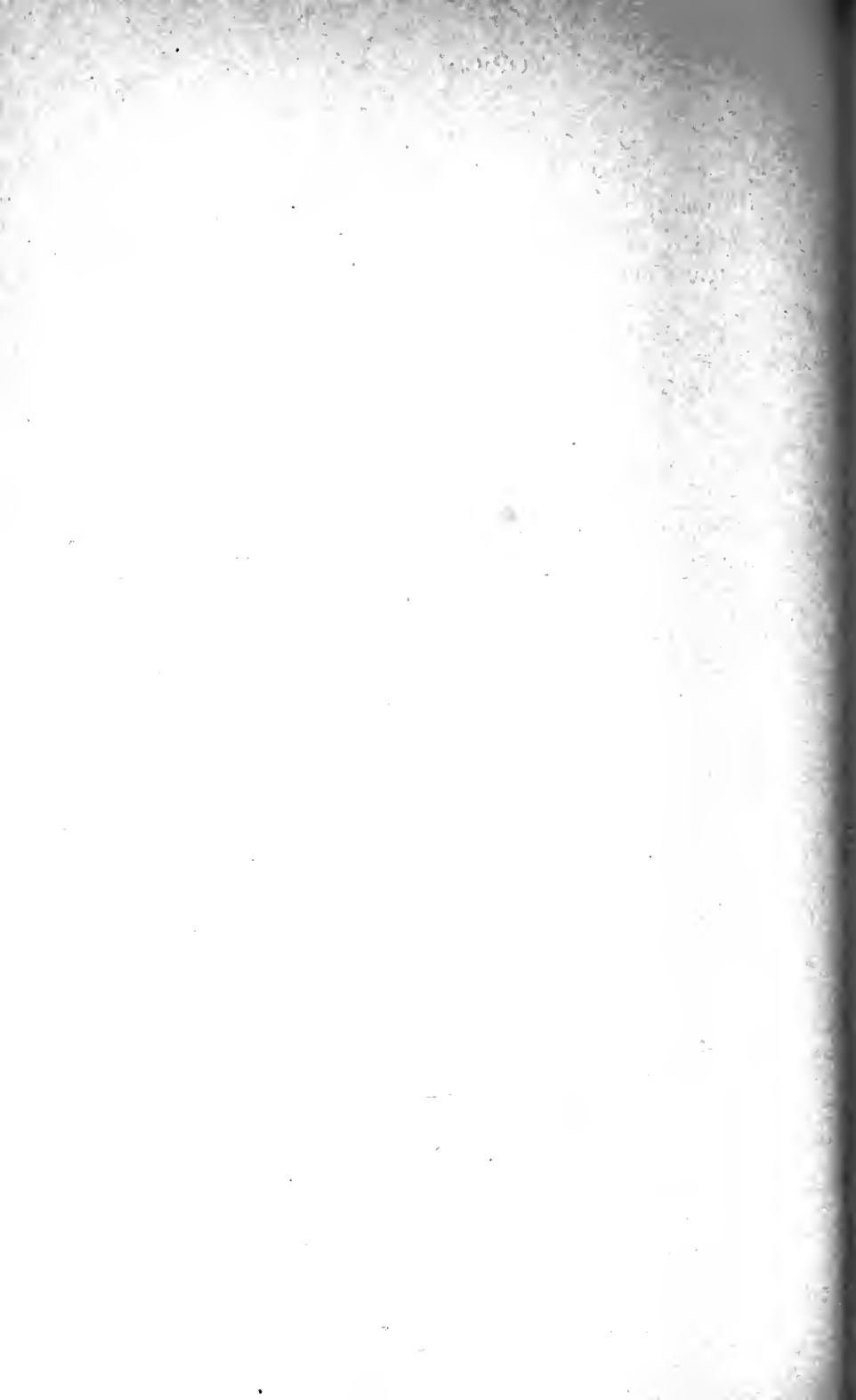
This court has adopted respondent's statement of the questions involved for decision, instead of those raised by petitioner, which has misled this court into basing its decision upon an incomplete factual basis.....	7
---	---

IV.

In holding that petitioner was precluded by the "best evidence rule" from introducing certain oral and documentary evidence, this court has entirely failed to consider and pass upon the effect of the undisputed evidence in the record showing a waiver by respondent of the best evidence rule, and the consent by respondent to the introduction of secondary evidence without laying any further foundation therefor.....	9
---	---

V.

Petitioner in its motion to reopen the cause for the presentation of further evidence upon the issue of the allowance of a proper rate for depletion of the ores in the properties owned by petitioner based its motion squarely upon undisputed evidence of the illness of its counsel, which was the direct cause of the failure to produce the evidence to which the Tax Court restricted the proof. Petitioner has not had the benefit of this court's decision as to whether the affidavits relied upon were deemed by it to be true or false, and if true, whether the facts therein recited constituted a sufficient reason for reopening the cause so that it could be determined on the merits rather than upon a procedural technicality.....	11
Conclusion	13



No. 10759

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CHIQUITA MINING COMPANY, LTD.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING.

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Petitioner, Chiquita Mining Company, Ltd., respectfully petitions this Court for a rehearing of the above-entitled cause, and bases its petition upon each and all of the following grounds:

1. Petitioner has not had the benefit of this Court's analysis and determination of the precise contentions urged by petitioner, *and as urged by petitioner*, for a reversal of the decision of The Tax Court of the United States.

2. This Honorable Court has inadvertently overlooked certain most essential phases of the evidence and the record.

3. This Court has adopted respondent's statement of the questions involved for decision, instead of those raised by petitioner, which has misled this Court into basing its decision upon an incomplete factual basis.

4. In holding that petitioner was precluded by the "best evidence rule" from introducing certain oral and documentary evidence, this Court has entirely failed to consider and pass upon the effect of the undisputed evidence in the record showing a waiver by respondent of the best evidence rule, and the consent by respondent to the introduction of secondary evidence without laying any further foundation therefor.

5. Petitioner in its motion to reopen the cause for the presentation of further evidence upon the issue of the allowance of a proper rate for depletion of the ores in the properties owned by petitioner based its motion squarely upon undisputed evidence of the illness of its counsel, which was the direct *cause* of the failure to produce the evidence to which The Tax Court restricted the proof. Petitioner has not had the benefit of this Court's decision as to whether the affidavits relied upon were deemed by it to be true or false, and if true, whether the facts therein recited constituted a sufficient reason for reopening the cause so that it could be determined on the merits rather than upon a procedural technicality.

We shall argue the grounds above set forth in the order in which they appear.

I.

Petitioner Has Not Had the Benefit of This Court's Analysis and Determination of the Precise Contentions Urged by Petitioner, and as Urged by Petitioner, for a Reversal of the Decision of the Tax Court of the United States.

We should perhaps begin the argument under this point with an apology, since it may appear that we are launching into an academic discourse on the manner in which this Court, or any appellate court, should render its decisions. We do feel, however, that the failure of this Court to set forth and answer the precise contentions of petitioner, *exactly as raised by petitioner*, has caused the Court to arrive at an incorrect and unjust conclusion.

The opinion sets forth the contentions of respondent and shows certain reasons why it holds respondent's contentions to be sound. Each of those reasons which are set forth were reasons advanced by respondent and based upon its own incomplete statement of the factual situation. The opinion does not, however, answer the criticisms advanced by petitioner, which, if given due consideration, would demonstrate the unsoundness of respondent's position.

From our experience in appellate court matters, we have observed that written opinions take one of three methods of procedure, or a combination of two or all of them.

An appellate court can take the individual contentions made by an appellant or petitioner, and it can demonstrate wherein such specific contentions are sound or unsound.

A second method consists of the court's taking the contentions of respondent, which it proceeds to adopt or reject.

The third course is to ignore the contentions of appellant and those of respondent, and to decide the case upon the court's own interpretation of the facts and the legal principles to be applied thereto.

We conscientiously believe that an appellant is entitled to a direct answer on his appeal with reference to the precise questions that are raised by him. If the court decides against him, he is particularly entitled to the court's opinion setting forth the reasons why *his* contentions are unsound. Consequently, the first course of procedure mentioned above will enable the appellant to be heard fully and his case determined by a direct decision upon each of the contentions urged by him.

We do not mean that the contentions of the respondent should be ignored in the process. On the contrary, the contentions of respondent can be utilized by the court as a means of ascertaining and revealing the flaws, if any, in the contentions of appellant.

But the second method of determining questions on appeal, which consists of the court's taking the contentions of respondent, which it proceeds to adopt or reject, in most instances has little worth. Its effect could be accomplished by a decision without opinion, with the mere statement that the contentions of respondent are correct.

The third manner of arriving at a decision, that is by the court setting forth its own statement of material facts and applicable legal principles, should be indulged in only when both appellant and respondent have entirely failed to appreciate the correct condition of the record and have

overlooked the true legal principle or principles which are determinative of the rights and obligations of the parties.

With all due respect to the Court, we feel that in its opinion the Court has not given us a direct answer to the exact questions which were raised by us in arguing certain most important contentions contained in our briefs. On the contrary, the Court has adopted respondent's theories, which entirely evade and avoid the major premises upon which petitioner's contentions are grounded.

In setting forth the above ground, we do not intend to be hypercritical of the Court's opinion. We do feel, however, that an appellant is entitled to have a decision directly upon the contentions urged by him. It is his appeal. He is either right or wrong. If he is wrong, he is entitled not only to be told so, but also to be shown wherein he is wrong.

The affirmation of respondent's position, standing alone, rarely gives a specific answer to the precise questions raised by an appellant. We sincerely believe that if the first procedure referred to by us above is followed, a decision in favor of petitioner will result.

II.

**This Honorable Court Has Inadvertently Overlooked
Certain Most Essential Phrases of the Evidence
and the Record.**

In our argument under subsequent points we shall argue certain individual points in detail, to which we shall refer only generally under this point.

Petitioner contended squarely in both its briefs and in oral argument that the record showed that there was an express waiver by counsel for respondent during the hearing before The Tax Court of the rule which obligated petitioner to produce and introduce primary evidence. This Honorable Court has evidently overlooked the express stipulation, waiver and consent by counsel for respondent, since nowhere in its opinion is any mention made of the effect thereof.

In determining whether The Tax Court had properly denied petitioner's motion for a further hearing, no mention is made of the undisputed evidence of the illness of counsel for petitioner. On the contrary, a reading of the opinion, particularly certain footnotes in which only a portion of one affidavit is set forth, leads one to feel that the Court proceeded upon the theory that the failure to produce the evidence to which the proof was restricted was caused by neglect which was inexcusable.

As we shall later show, this inadvertent failure to consider the most essential premises of the questions raised by petitioner has naturally resulted in a different result from that which would have resulted if all the facts were given due and full consideration.

III.

This Court Has Adopted Respondent's Statement of the Questions Involved for Decision, Instead of Those Raised by Petitioner, Which Has Misled This Court Into Basing Its Decision Upon an Incomplete Factual Basis.

On pages 9 and 10 of our opening brief, as our third specification of error we set forth the following individual contentions that The Tax Court had committed prejudicial error:

“Counsel for the Commissioner *having agreed to the introduction of secondary evidence* in lieu of certain written documents, the Court erred:

“(a) In restricting the proof to such written documents;

“(b) In rejecting the secondary evidence of the attorney for petitioner, concerning the consideration for said mining properties paid by petitioner, and that *portion* of said consideration which was received by the vendors, Jack H. Smith and Otto F. Schwartz, upon the question as to whether said vendors were at any time thereafter in as much control of petitioner's affairs as they had been prior to the acquisition of said properties by petitioner;

“(c) In rejecting the secondary evidence of Mark J. Sandrich, C. P. A., on the same subject;

“(d) In rejecting the books and records of petitioner in the possession of said Mark J. Sandrich, C. P. A., on the same subject.”

It will be observed that each of those contentions is predicated directly upon the premise that counsel for respondent had agreed to the introduction of secondary evidence in lieu of certain written documents which petitioner did not produce.

On pages 18 to 21 of our brief, we again repeated the statement of this contention and set forth at length the portion of the printed record which clearly supported our claim of an express consent to the introduction of secondary evidence.

On pages 2 and 3 of his brief, respondent has rephrased the statement of our contentions, and it will be noted that respondent has carefully avoided any reference whatsoever to his waiver of the right to object to secondary evidence.

On pages 5 to 7 of its opinion, this Court has apparently adopted respondent's phrasing of appellant's alleged contentions; and by doing so, has inadvertently omitted any reference in its decision to the existence and effect of the express waiver by counsel for respondent of the right to object to the introduction of the various kinds of evidence offered by petitioner, and specifically argued under specification of error No. 3.

IV.

In Holding That Petitioner Was Precluded by the "Best Evidence Rule" From Introducing Certain Oral and Documentary Evidence, This Court Has Entirely Failed to Consider and Pass Upon the Effect of the Undisputed Evidence in the Record Showing a Waiver by Respondent of the Best Evidence Rule, and the Consent by Respondent to the Introduction of Secondary Evidence Without Laying Any Further Foundation Therefor.

We have already demonstrated under the preceding point that this Court has been misled by respondent's phrasing of the contentions which petitioner is supposed to be urging on this review, into predicating its opinion upon an incomplete statement of facts. To us the erroneous conclusion drawn therefrom is self-evident.

As we read the Court's opinion, each type of evidence proffered by petitioner and rejected by The Tax Court was secondary evidence. This Court held that it was therefore properly excluded. Everything, however, which the Court sets forth to justify the rulings of The Tax Court would have to be reversed if due consideration were given to the express consent by counsel for respondent to the introduction of secondary evidence. There is no hard and fast rule that secondary evidence is always inadmissible. It is universally held that the benefits of the best evidence rule can be waived. We contended that there had been such a waiver in the instant case by express stipulation by counsel for respondent in open court. We respectfully request a decision on this point.

In arguing the questions concerning secondary evidence, we do not wish to be understood as conceding that the books and records which Sandrich, the C. P. A., set up for the corporation, were not proper books and records kept in the ordinary course of business by the corporation, and admissible under the best evidence rule. There is no evidence in this record that these books and records set up for the corporation by Mr. Sandrich were set up by him for the purpose of meeting this tax situation. The evidence, on the contrary, shows that they were in existence long before these proceedings were initiated. That they are correct would definitely and conclusively seem to appear from the fact that petitioner has paid its taxes to the government based upon those records, and the government has been unable to find any error therein. In short, the only objection that has been made, with the expenditure of over a million dollars, is that petitioner adopted an incorrect rate of depreciation and an improper rate of depreciation. As to the former The Tax Court held that petitioner was justified in adopting the rate of depreciation used by it. With reference to the latter, petitioner has adopted as its basis a theory twice previously adopted, ratified and confirmed by the Bureau of Internal Revenue.

We have purposely not raised the question of former rulings of the Bureau of Internal Revenue in this petition for rehearing; but if used for no other purpose, those prior decisions indicate that the present theory of petitioner has reasonable justification.

V.

Petitioner in Its Motion to Reopen the Cause for the Presentation of Further Evidence Upon the Issue of the Allowance of a Proper Rate for Depletion of the Ores in the Properties Owned by Petitioner Based Its Motion Squarely Upon Undisputed Evidence of the Illness of Its Counsel, Which Was the Direct Cause of the Failure to Produce the Evidence to Which the Tax Court Restricted the Proof. Petitioner Has Not Had the Benefit of This Court's Decision as to Whether the Affidavits Relied Upon Were Deemed by It to Be True or False, and if True, Whether the Facts Therein Recited Constituted a Sufficient Reason for Reopening the Cause so That It Could Be Determined on the Merits Rather Than Upon a Procedural Technicality.

This Court has disposed of the contention on the part of petitioner that The Tax Court abused its discretion in denying petitioner's motion for a further hearing by a repetition of its holding that certain evidence was available to petitioner and should have been presented in the original hearing. Once again, the Court is dealing with an effect and not the cause for that effect. In our contentions with reference to the claim that The Tax Court erred in rejecting certain types of evidence, we were concerned with certain *effects* existing during the trial. These effects related to the failure to produce the evidence which The Tax Court held should have been produced. In petitioner's motion for a further hearing, the reasons were set

forth why that evidence was not produced. Those reasons constituted the *cause*. This was an entirely new question which was not presented during the trial. We sincerely feel that we were entitled to the benefit of this Court's determination whether that cause was a sufficient cause. The opinion summarily disposes of the question with the following language:

"The petitioner is not entitled to a rehearing to remedy the mistakes of counsel since the taxpayer has had his day in court. Counsel in this case were neither unauthorized nor incompetent."

The language of the Court deals with this entire question as if the failure to produce the evidence in question resulted solely from a mistake on the part of counsel for petitioner. No mention is made of the illness conclusively proved by the affidavits filed in support of petitioner's motion, and against which no contradictory proof was offered by respondent. We feel that we have not had our day in court. It is our firm belief that a just decision on the merits should not be sacrificed to the rigidity of technical rules of procedure. Rules of procedure are adopted to promote justice, not to defeat it. Ours is the realistic point of view.

It has been said that more and more the circuit courts of appeal have become the supreme court for about ninety-nine per cent of litigants in the federal system. The realistic attitude towards litigants is that which regards substance rather than form, and which holds that a thing which is morally wrong cannot be legally right.

Conclusion.

We trust that this Court will pardon our approach to the questions presented by us on this petition for rehearing. We have tried to consider the various phases of the several questions from a practical viewpoint. It will be noted that in this petition we have refrained from a repetition of citations and quotations which are contained in our briefs. However, we respectfully call this Court's attention to those citations, particularly in the light of what we have said above.

We earnestly contend that substantial justice will not be done unless a rehearing is granted, and that the United States of America, as represented by respondent, should not be unjustly enriched by the collection of a tax which a hearing on the merits would disclose should not be collected.

Respectfully submitted,

A. P. G. STEFFES,

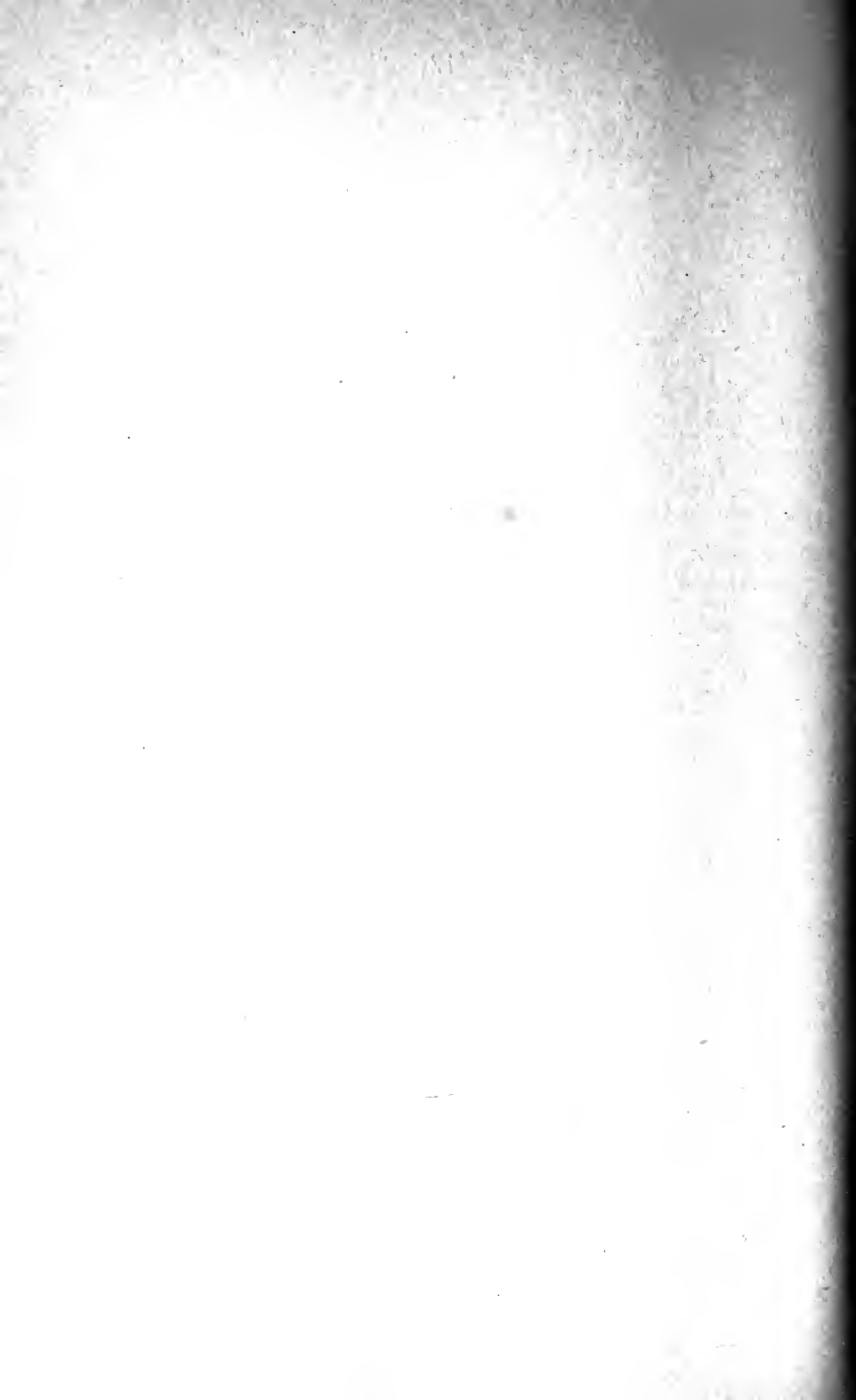
Attorney for Petitioner.

Certificate of Counsel.

The undersigned counsel of record hereby certifies that the foregoing petition is well founded and is not interposed for the purpose of delay.

A. P. G. STEFFES,

Attorney for Petitioner.



No. 10759.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

— 4 —
CHIQUITA MINING COMPANY, LTD.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

—
CLOSING BRIEF OF PETITIONER.
—

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FILED

JAN 27 1935

PAUL P. O'BRIEN,
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TOPICAL INDEX.

	PAGE
Foreword	1
Opinion below	3
Jurisdiction	4
Questions presented	4
Statutes and rules involved.....	5
Statement	5
1. Motions for continuance	5
2. Prior Bureau rulings	8
3. Testimony of Mr. Steffes.....	10
4. Statements by Mr. Sandrich and offer of his papers.....	12
5. Motion to reopen the cause.....	13
Summary of argument.....	13
Argument	14
Respondent's contention that the taxpayer is not entitled to a second hearing before the tax court.....	14
I.	
Respondent's contention that the tax court did not err in re- fusing a continuance.....	14
II.	
Respondent's contention that the tax court did not err by re- fusing to admit evidence of prior determinations of the Bureau of Internal Revenue.....	19

III.

Respondent's contention that the tax court did not err by excluding the testimony of Mr. Steffes as to his recollection of the contents of certain documents.....	23
---	----

IV.

Respondent's contention that the tax court did not err by excluding testimony of taxpayer's accountant as to the contents of taxpayer's books or in excluding accountant's working papers in lieu of taxpayer's books.....	26
--	----

V.

Respondent's contention that the tax court did not err in denying taxpayer's motion to reopen the cause.....	32
Conclusion	36

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Bankers Coal Co. v. Burnet, 207 U. S. 308.....	33
Burnet v. Porter, 283 U. S. 230.....	20, 21
Chatham Phenix Nat. Bank and Trust Co. v. Helvering, 87 F. (2d) 547	36
Chicago Railway Equipment Company v. Commissioner, 4 B. T. A. 452	28, 31
Consolidated Coke Co. v. Commissioner, 70 F. (2d) 446.....	27
Crane-Johnson Co. v. Commissioner, 105 F. (2d) 740.....	34
Hobby v. Commissioner, 97 F. (2d) 731.....	15
Hughes v. Commissioner, 104 F. (2d) 144.....	33
McIlhenny v. Commissioner of Internal Revenue, 39 F. (2d) 356	20
O'Rear v. Commissioner, 80 F. (2d) 473.....	34
Scott v. Commissioner, 117 F. (2d) 36.....	33
Tonningsen v. Commissioner, 61 F. (2d) 199.....	20, 21

STATUTES.

Revenue Act of 1928, Sec. 112(b)(5) (C. 852, 45 Stat. 791)....	1
--	---

TEXTBOOKS.

9 Mertens, Law of Federal Income Taxation, Sec. 50.6.....	23
9 Mertens, Law of Federal Income Taxation, Sec. 50.52.....	16
Wigmore on Evidence (2d Ed.), Sec. 1198.....	27
4 Wigmore, Evidence (3rd Ed.), Sec. 1177.....	24



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CHIQUITA MINING COMPANY, LTD.,

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CLOSING BRIEF OF PETITIONER.

Foreword.

For the sake of clarity, we shall answer respondent's brief by referring to the various subdivisions thereof and shall indicate by appropriate page references the portion of that brief which is being answered under the designated title or subtitle.

Before proceeding, however, to a discussion of the matters contained in respondent's brief we wish to demonstrate the simplicity of the issue presented to the Tax Court on the question of depletion, by the application of the provisions of Section 112(b)(5) of the Revenue Act of 1928, C. 852, 45 Stat. 791, set forth on page 34 of

respondent's brief. We quote the portion of the section referred to:

"SEC. 112. RECOGNITION OF GAIN OR LOSS.

* * * * *

(b) *Exchanges solely in kind.*

* * * * *

(5) *Transfer to Corporation Controlled by Transferor.*—No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such corporation, and immediately after the exchange such person or persons are in control of the corporation; *but in the case of an exchange by two or more persons this paragraph shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.*" (Emphasis ours.)

Prior to the acquisition by petitioner of the mining properties from Jack H. Smith and Otto F. Schwartz, the entire ownership of the mining properties vested in them alone. Immediately upon their conveyance of the mining properties to petitioner, in legal contemplation the 500,000 shares of the capital stock of petitioner were deemed to be issued. Since no other shares of the capital stock were then outstanding, this block of 500,000 shares represented the total stock ownership of petitioner corporation. At no time did Jack H. Smith and Otto F. Schwartz own more than 250,000 shares of the capital stock of Chiquita Mining Co., Ltd. In other words, at no time after the conveyance of the mining properties,

did they own equitably through stock ownership (or otherwise), more than a half interest in the mining properties which had been conveyed by them to petitioner and which constituted the sole assets of the corporation at the time.

The simple issue thus presented to the Tax Court was this: Was the amount of stock and securities received by Jack H. Smith and Otto F. Schwartz substantially in proportion to their interest in the mining properties prior to the exchange?

In determining the amount of stock received by them it is obvious that this could be proved not only by the contracts which in their nature specified *what should be done in the future* but also by other evidence and testimony proving *what had actually been done in the past*. As we have shown in our opening brief and shall likewise show herein, the Tax Court arbitrarily restricted the proof to proof of contracts rather than to permit competent proof of the ultimate fact which is prescribed in the section quoted above, as the test for determining whether the transaction in question was a taxable transaction.

Opinion Below.

(Resp. Br., p. 1.)

Respondent is correct in stating that the opinion of the Tax Court [R. 23-26] is unreported.

Jurisdiction.

(Resp. Br. p. 1)

The statement of jurisdictional facts contained in respondent's brief is likewise correct.

Questions Presented.

(Resp. Br. pp. 2 and 3.)

The *ultimate* question whether the case should be remanded to the Tax Court for further hearing on the issue decided adversely to the taxpayer, is in accord with petitioner's understanding of that question. However, we do not agree with certain details, which in his statement of *subsidiary* questions, respondent has either added to or omitted from the questions which petitioner raised in its opening brief.

It is apparent from a reading and comparison of the questions raised in the opening brief and those set forth in the brief of respondent that respondent has not given a direct answer to our questions. Respondent has, on the contrary, taken the questions generally, as raised by petitioner, and revised them to make them answerable. This will appear from what we shall say hereinafter.

One thing particularly is noteworthy. In order to justify the rulings of the Tax Court respondent now attempts to avail himself of objections that are made here for the first time and were not made during the hearing. Furthermore, such objections if they had been made at the hearing could easily have been obviated by petitioner at the time.

Statutes and Rules Involved.

(Resp. Br. p. 3.)

Respondent refers to certain statutes and rules set forth on pages 34 to 37 of his brief. No comment concerning them is required at this point, but we shall discuss them, when and if necessary later in this brief.

Statement.

(Resp. Br. pp. 3 and 4.)

This statement of respondent is also correct.

1. Motions for Continuance.

(Resp. Br. pp. 4 to 7.)

The statement of respondent of the preliminaries leading up to the ruling of the Tax Court on the motion for a continuance requires no comment. Certain portions of the Court's own statements, however, on pages 6 and 7 of respondent's brief, definitely show how petitioner was shuttled about from one type of proof to another. By this we mean, that when petitioner attempted to prove the ultimate fact in issue by one kind of evidence, an objection thereto was sustained and petitioner was told in effect, as stated by respondent himself on page 24 of his brief, that "other competent evidence and testimony were available." When petitioner then proceeded to avail itself of certain of that "other competent evidence and testimony," it was again met with an objection which was likewise sustained. Every objection to available evidence was sustained, and petitioner was forced to understand that the ultimate fact in issue could be proved in only one way and that was by evidence which was *unavailable* at that time.

The first remark of the court to which we desire to call attention is the following:

“This case has been set a *long time*.”

On August 26, 1942, the case was set for hearing for the first time. The actual hearing date was fixed for October 12, 1942. The “long time” to which the judge of the Tax Court referred amounted exactly to forty-seven days. In the light of our experience with the trial calendars of other courts, we would say that this not only was not a long time between the setting and the trial but an unusually short time. This, we feel, is a very forceful example of the standards that were set up during the hearing with which petitioner was obligated to conform.

Another statement which is interesting when we consider the later rulings of the Tax Court is the following:

“Now, all we want to know in this case is how a certain transaction was carried (out), *not the details*, but the *broad general principles*, to see whether you come within the Revenue Act.”

Here the Tax Court definitely indicated that specific details were not of importance but that broader questions were involved. By its next statement it clearly showed that because of the broadness of the general principles involved, the proof thereof would not be limited to the testimony of Maxfield and Wilton but that there might be any number of people who could testify to the same effect. We refer to this language of the Tax Court:

“Now, there is no showing—there might be any number of people who might know about it. *I would think any person who had anything to do with it would know about it.*”

The latter sentence is most interesting when we consider that in attempting to determine the proportionate number of shares of the capital stock of petitioner that had been received by Jack H. Smith and Otto F. Schwartz, the Tax Court rejected the testimony of a certified public accountant who had made an exact audit of all of the books and records of petitioner from the time of its incorporation to the date of the hearing.

We certainly had the right to take the Tax Court at its word. We did believe at this point in the proceedings, that the Tax Court would not thereafter exclude "other competent evidence and testimony" that "were available," as stated by respondent in his brief. Had such other competent evidence and testimony been admitted, no prejudicial effects could have resulted from the failure of the Tax Court to grant petitioner's motion for a continuance. That evidence, however, having been excluded, the prejudicial effect of the Court's ruling in this first instance becomes at once apparent.

The concluding statement of respondent under this point, that the witnesses had been called when the depletion issue had not been entered, discounts itself. The record clearly shows that both witnesses refused to give any further testimony. The law certainly does not require idle acts and neither should the Tax Court. Respondent cannot seriously contend that the two witnesses, if called later when the depletion issue had been reached, would have testified concerning it.

2. Prior Bureau Rulings.

(Resp. Br. pp. 7 and 8.)

Respondent's statement with reference to the specific portions thereof to which attention is called, is substantially correct as far as it goes. There is, however, an inaccuracy therein. Respondent states on page 7 of his brief:

“These prior determinations apparently involve the tax on the transfer of securities. [R. 60-61.]”

There were two such determinations. Neither involved the determination of the tax due on the TRANSFER of securities. The first deficiency that was assessed against petitioner related to the tax due on the ISSUANCE of securities. In that instance which occurred in May, 1933, petitioner was penalized for having failed to purchase and cancel documentary stamps due upon the issuance of the 500,000 shares of its capital stock as the consideration for the mining properties in question, even though CERTIFICATES representing only approximately one-third of the number of shares above mentioned had been issued and delivered. Furthermore, petitioner was compelled to purchase and cancel documentary stamps upon the remainder of the 500,000 shares, for which certificates had not previously been issued. The government took the position, which is undoubtedly correct, that when the mining properties were conveyed to the corporation, the entire consideration therefor, to wit, 500,000 shares of petitioner's capital stock, were *ipso facto* issued and delivered, even though CERTIFICATES therefor had not actually been issued or delivered. The Bureau of Internal Revenue in assessing the deficiency and in penalizing petitioner in addition thereto, definitely held and determined under the procedure

followed by it with reference to documentary stamp taxes, that the consideration for the transfer to petitioner of the mining properties in question, was 500,000 shares of petitioner's capital stock. That determination has never been vacated, modified or in any way repudiated, in so far as petitioner's liability for that type of tax, is concerned.

The second instance occurred approximately in July or August of 1934. At that time the Bureau investigated the amount of documentary stamp taxes that had been affixed to the deeds conveying the mining properties to petitioner. The investigation concerned itself directly with the amount of consideration paid by the corporation for the properties in question. The Bureau of Internal Revenue upon the conclusion of its investigation definitely determined that the total consideration paid by petitioner for said mining properties was the sum of \$500,000.00. Upon that basis the Bureau assessed a deficiency which was paid by petitioner. At that time petitioner voluntarily adopted the conclusions and determinations made by the Bureau of Internal Revenue. Incidentally, this second determination was consistent with the former determination and, in effect, ratified it.

With reference to the taxes there paid, those conclusions and determinations have at all times been adhered to by petitioner and respondent. It is only now, when those conclusions and determinations will lessen the taxes to be paid by petitioner that respondent attempts to repudiate its prior findings of fact and conclusions of law.

3. Testimony of Mr. Steffes.

(Resp. Br. pp. 8 to 12.)

The recital contained in this portion of respondent's brief is substantially correct but the strength of petitioner's position with reference to laying a foundation for the use of secondary evidence is more apparent from the statement made by the counsel-witness which is set forth on page 20 of our opening brief. We refer to the following:

"Mr. Steffes: I would like to make a showing as the reason for the absence of documentary testimony at this time—well, I would like to make that showing so as to lay the foundation for the production of secondary evidence in lieu of such primary evidence."

He was told to proceed by the judge, but his statement was interrupted by counsel for respondent who, in effect, at this point stipulated to the introduction of secondary evidence. This interruption is disclosed by the incomplete sentence at the end of the first paragraph on page 12 of respondent's brief.

After Mr. Steffes had then stated to the court and counsel that the secondary evidence would be his personal knowledge of those documents which he personally prepared and some of which he personally turned over to Mr. Crupf of the S. E. C., he was again interrupted, this time by the Court. Respondent shows this interruption in the last paragraph on page 12 of its brief. We do not agree with counsel that the portion of the record on pages 98 to 101 of the Transcript of the Record limited this offer of proof of secondary evidence to the depreciation issue. It is true that Mr. Steffes at that time felt that petitioner had not finally closed its case on the depreciation issue, but it is equally true that the documents in question which

were unavailable at the time related to both issues. It will be observed from a reading of the Transcript, that no statement was made nor was any discussion had which would limit this testimony to the issue alone which was decided in favor of petitioner.

The portion of the record to which respondent refers indicates that it consisted of an academic discussion between the court and counsel for petitioner as to what petitioner would have to prove. Counsel for petitioner correctly stated the issue with reference to depreciation. It is quite apparent that the Court was not then interested in this issue but was interested in the issue of depletion. We believe that respondent will concede that in the latter part of the discussion, when explaining the issue with reference to depletion, counsel for petitioner gave a correct explanation. That counsel for petitioner was referring to both issues clearly appears from the statement made by him to the Court on page 101 of the Transcript of the Record.

“Mr. Steffes: Well, I would like to make this comment, because I feel that here is a misunderstanding, that that refusal to testify or to offer evidence by these two witnesses goes to the question of depreciation as well as the question of depletion, and I make that with all due respect to the Court, having a personal knowledge of the facts upon which that request and motion is made.”

That statement was shortly thereafter followed by this explanation given by counsel to the effect that he did not at that time believe that the hearing had arrived to the determination of the issue of depletion. We refer to the

following statement on the same page of the Transcript of the Record:

“Mr. Steffes: I didn’t think we had entered it yet, your Honor. My understanding was that the witnesses were called by Mr. Sandrich on the question of depreciation, and I still feel that my recollection of the record is correct, and that during that portion of the hearing both witnesses and each of them refused to testify on their constitutional grounds. Now, if that has been disposed of, I have no alternative but to proceed with the question of depletion.”

There certainly is nothing in the portion of the record designated by respondent or any other part of the record to the effect that the testimony of Mr. Steffes was limited and restricted by petitioner to the issue of depreciation.

4. Statements by Mr. Sandrich and Offer of His Papers.

(Resp. Br. pp. 13 to 16.)

Respondent’s statement and quotation from the record in this portion of his brief are likewise substantially correct. The preliminary statement made by Mr. Sandrich, the certified public accountant, which was evidently accepted as true by both the Court and counsel for respondent definitely showed that certain records which he had set up for the corporation approximately two and one-half years before the notice of deficiency was mailed to petitioner on May 1, 1941, constituted the *permanent records of the corporation*. Those records were in detail and were offered for the inspection of counsel for respondent. An offer was later made to introduce those records *in toto*.

It will be observed that no objection was made nor did the Tax Court reject the evidence on the ground that the records were not actually in the court room. It can be assumed that such records were quite voluminous and where they could have been produced in the court room within ten minutes, as stated, certainly there is no merit in the contention of respondent on these proceedings for a review that the records were not actually in the court room. Had such objection been made at the time of the hearing, petitioner before the close of the hearing, could and would have actually produced the records in the court room and renewed its offer to introduce them.

5. Motion to Reopen the Cause.

(Resp. Br. pp. 16 to 18.)

This statement, in so far as it goes, and the portion of the affidavit of the certified public accountant on the motion to reopen the cause require no comment at this point. They too are substantially correct in so far as they go.

Summary of Argument.

(Resp. Br. pp. 18 to 20.)

Since we shall answer each of the points which are briefly alluded to in the summary, when discussing the various points in detail later in this brief, we shall not make any comments with reference to this summary of the argument except the following:

Here again respondent states on page 19 of its brief that in addition to the testimony of Maxfield and Wilton "other competent evidence *and testimony* was available." Later in his summary respondent attempts to prove that such other competent evidence and testimony was in fact incompetent and inadmissible.

ARGUMENT.

Respondent's Contention That the Taxpayer Is Not Entitled to a Second Hearing Before the Tax Court.

(Resp. Br. pp. 21 to 23.)

Since this contention, if correct, follows as a conclusion from the arguments made under the succeeding five points discussed on pages 23 to 33 of respondent's brief, we shall answer respondent's contentions set forth on pages 21 to 23, after we have answered the subsequent points in its brief which are the premises upon which respondent bases his conclusions.

I.

Respondent's Contention That the Tax Court Did Not Err in Refusing a Continuance.

(Resp. Br. pp. 23 to 25.)

Two of the three grounds urged by respondent which are claimed to justify the court's denial of a continuance after Maxfield and Wilton had refused to testify are that "the case had been set for hearing for a long time" and "other competent evidence and testimony was available."

The determination by this court whether the period of forty-seven days between August 26, 1942, and October 12, 1942, constitutes a "long time" requires no argument or discussion. We submit that since this was the first hearing that was ever set, the case had not "been set for hearing for a long time."

In advancing his second ground, respondent refers both to EVIDENCE and TESTIMONY. Respondent cannot now be heard therefore to state that the competent evidence to which he referred, consisted only of the documentary evidence which petitioner was unable to produce during the hearing. The only authorities cited in support of respondent's position are cited on page 24 of respondent's brief. We shall discuss and distinguish each of the two authorities cited.

Respondent cites the case of *Hobby v. Commissioner*, 97 F. (2d) 731, 732 (C. C. A. 5th) in support of his contention that the Tax Court did not err in refusing a continuance. The third reason given by respondent for the correctness of the Tax Court's ruling on the application for a continuance is "other competent evidence and testimony were available." In the cited case it was held that there was no showing with reference to the testimony of absent witnesses "that the same facts could not be proven by other witnesses who were available."

We concede that at the hearing "other competent evidence and testimony were available"; however, as we have pointed out, that competent evidence and testimony was rejected by the Tax Court. It is the rejection of that evidence which magnifies the abuse by the Tax Court of the discretion vested in it. Had such "other competent evidence and testimony" been admitted, petitioner would have unanswerably proved its case and petitioner would not now complain of its inability to utilize the testimony of the witnesses Maxfield and Wilton.

Respondent also cites at this point 9 Mertens, Law of Federal Income Taxation (1943), Sec. 50.52. After quoting Rule 20, the first statement made under this section is as follows:

“Although the Board has been extremely liberal in granting extinctions, it will exercise its discretion to refuse applications made for dilatory purposes, and where a proceeding has been at issue for a long time the Board may, in order to expedite its work, refuse continuance.”

The record in this case discloses that the hearing in question was the very first hearing ever set in this matter. Furthermore, the hearing was set on August 26, 1942, and on that date the Tax Court fixed the date of hearing as October 12, 1942. Only forty-seven days elapsed between those two dates. The matter was at issue since September 25, 1941, when the answer of respondent was filed, but no steps were taken by respondent to have the matter placed on the Los Angeles calendar until August 26, 1942, as stated above. Certainly there is nothing in the record which indicates any unusual delay and most assuredly there is nothing showing that the request for a continuance was made for the purpose of delay only. Petitioner was attempting to get the truth before the Tax Court, and even a slight display of liberality on the part of the Tax Court would have accorded to the taxpayer an opportunity to have the question, presented in good faith by it, determined on its merits.

Respondent next makes the following contentions on page 24 of his brief:

“As further support for the refusal to grant a continuance, we desire to emphasize, contrary to the taxpayer’s contention (Br. 11) that the refusal of Maxfield and Wilton to testify was *not* on the ground that their testimony might tend to incriminate them. [R. 78, 81, 83.] Unless they expressly claimed their constitutional privilege, the taxpayer could have insisted that they be required to testify. This was not done. Instead the witnesses were led up to the point where they stated they would refuse to testify and were then excused by taxpayer’s counsel.”

Once again respondent urges an objection in these proceedings on review, which was not made at the hearing, and which, if made, could and would have been remedied by petitioner. Certainly respondent does not seriously assert at this time that the witnesses would have testified if petitioner had “insisted that they be required to testify.”

Respondent then draws this conclusion:

“From what took place, it is not unreasonable to infer that the witnesses were called only to set the stage for a request for additional time, in order that taxpayer’s counsel might obtain the documentary evidence which Mr. Sandrich had relied upon Mr. Steffes had failed to produce. [R. 31-32.]”

In drawing this conclusion respondent obviously overlooks the fact that at this point in the proceedings, peti-

tioner had not yet been given to understand that its proof would be restricted to the documentary evidence to which respondent refers. Petitioner was certainly lead to believe by the remarks of the judge presiding, that there were any number of witnesses that could testify to the same facts that were desired to be elicited from the two witnesses who refused to testify.

Respondent concludes his argument under this point with the alternative contention that petitioner was not injured since these witnesses were placed on the stand to testify concerning the depreciation issue which was decided in favor of petitioner. It is true that there were certain items relative to the depreciation issue which were exclusively within the knowledge of the witness Maxfield. But the fact that he had such exclusive knowledge of certain facts relating to the issue of depreciation, did not prevent him from having a knowledge concerning facts pertaining to the issue of depletion. When we consider that Maxfield, as the CHIQUITA MINE SYNDICATE, acquired one-half of the stock that was issued in payment for the mining properties that were conveyed by Jack H. Smith and Otto F. Schwartz to petitioner, it is absurd to suggest at this time that petitioner was not prejudiced by the refusal of a continuance. As we remarked above, the prejudicial effect of the court's ruling was greatly magnified by its subsequent rulings in rejecting various types of evidence offered by petitioner on the simple issue that was presented to it for determination.

II.

Respondent's Contention That the Tax Court Did Not Err by Refusing to Admit Evidence of Prior Determinations of the Bureau of Internal Revenue.

(Resp. Br. pp. 25 to 27.)

In his first paragraph under this point respondent emphasizes his contention that no formal offer of this evidence was made. If there had been any doubt whatsoever concerning the attitude of the Tax Court with reference to evidence of prior determinations of the Bureau of Internal Revenue, respondent might with good grace be heard to say that petitioner should have formally offered the evidence in question. In view, however, of the emphatic statement of position by the presiding judge there was no room whatsoever left for any doubt. Any more formal offer than that which was actually made might have antagonized the Court, and counsel for petitioner, in view of the court's previous remarks, certainly did not desire to incur the further displeasure of the Court.

Thereafter, on page 26 of respondent's brief, the following statements and citations of authorities appear:

"It is utterly fantastic to contend that the Commissioner is estopped to determine a deficiency in income and excess profits taxes for the taxable years here involved because in 1933 and 1934 deficiencies in documentary stamp tax may have been found to exist. (Taxpayer's Br. 14-17, 36-37.) Such evidence is clearly irrelevant, for it has been held time and again that the Commissioner is not estopped by his prior determinations. See, *e. g.*, *Burnet v. Porter*, 283 U. S. 230; *Tonningsen v. Commissioner*, 61 F. 2d 199 (C. C. A. 9th). The Tax Court would not have erred if it had excluded such evidence."

In the case of *Burnet v. Porter*, the Commissioner of Internal Revenue had first approved a deduction and allowed a claim for refund and later reopened the case, disallowed the deduction and redetermined the tax. As pointed out in the decision under the applicable statutes mentioned therein, the decision had not attained any degree of finality. In the present case, the determination of the precise question at issue here, by the Bureau of Internal Revenue particularly when it fixed the amount of documentary stamp tax due the government when petitioner acquired the mining properties in question, has never been vacated or modified. Certainly, the additional tax paid by petitioner at that time has never been refunded to it. The rejection of the evidence in this case, it will be observed, was not predicated upon the ground that the prior determinations were not final under Federal statutes, but generally that any and all evidence of prior acts or determinations of the Commissioner were immaterial. In other words, the evidence was excluded on the ground of immateriality and not upon the ground of insufficiency with reference to the finality of the prior determination or determinations.

In the cited case the court stated that the United States Circuit Court of Appeals for the Third Circuit was clearly right in sustaining the power of the Commissioner upon the authority of *McIlhenny v. Commissioner of Internal Revenue* (C. C. A. 3d C.), 39 F. (2d) 356. In the latter case the sole question which was involved was whether the Commissioner should have followed certain statutory provisions mentioned in the decision or whether the Commissioner was bound by Commissioner's General Order of

January 20, 1923, which was obviously in conflict with the statutory provisions above referred to. That situation, of course, does not exist in the present case, since not later than 1934, both the taxpayer and the Commissioner for the purpose of fixing one type of government tax have adopted and at least by acquiescence have ratified the fixing of a certain consideration as the cost price to petitioner of the mining properties which it acquired.

In the case of *Totningsen v. Commissioner*, 61 F. (2d) 199 (C. C. A. 9th), the same situation existed as in the case of *Burnet v. Porter*, *supra*. What we have said above is equally applicable to the decision by this court in the case last cited. There is one further distinction that applies here as well as to the decisions in the other cases mentioned in the opinion, and that is this: Petitioner is not attempting to rely upon a previous determination of the *amount of taxes due* from it to the government. It is relying, however, upon a former determination concerning a factual situation and the legal effect thereof, which constituted the basis of assessing a deficiency tax against petitioner which has never since been disturbed. We are not attacking the power of the Commissioner to redetermine a tax in those cases which are specifically provided for by statute. We do contend, however, that the same principles of equity and good conscience apply to a Commissioner of Internal Revenue in his official capacity as would apply to him in his private dealings in his individual capacity. To be more explicit, we feel that the government, acting through the Commissioner of Internal Revenue, should not be permitted in order to collect a greater tax, to adopt one theory and then later likewise in order to collect a greater tax, adopt the opposite theory. When he has fixed a standard in one case

by which the taxpayer has been bound and that standard in the transaction where it was fixed and established, has never been changed, the Commissioner of Internal Revenue in equity and good conscience should likewise be bound by that standard for the purpose of fixing other kinds of taxes. We, of course, further contend that had the Tax Court not rejected all the "competent evidence and testimony" that were available at the hearing, the proof would have demonstrated that the Bureau of Internal Revenue was correct in the first instance in fixing the standard as to the price paid by petitioner for its mining properties.

If the evidence concerning the two prior determinations of the Bureau of Internal Revenue was inadmissible as proof of an estoppel against respondent, it may still serve a useful purpose in these review proceedings. In the present hearing, petitioner was attempting to prove the very thing that the Bureau of Internal Revenue had succeeded in proving to petitioner, in order to collect additional taxes and a penalty from petitioner. Since respondent was successful on these former occasions, it is reasonable that petitioner would likewise have been successful in proving by means of the other competent evidence and testimony that were available, that the transaction in question was a taxable transaction, since Jack H. Smith and Otto F. Schwartz had not received for the mining properties shares of the capital stock of petitioner, the amount of which was substantially in proportion to their interest in those properties prior to the exchange.

III.

Respondent's Contention That the Tax Court Did Not Err by Excluding the Testimony of Mr. Steffes as to His Recollection of the Contents of Certain Documents.

(Resp. Br. pp. 27 to 29.)

The questions which respondent attempts to raise indicating that the documentary evidence which petitioner claims was unavailable at the hearing, was in fact available, are certainly moot. Any and all such questions were effectively eliminated from further consideration by the stipulation of respondent at the hearing substantially to the effect that secondary evidence could be introduced by petitioner without the necessity of laying a further foundation therefor. This is especially true when we consider that counsel for petitioner was interrupted by counsel for respondent when the former was proceeding to lay a proper foundation for the introduction of secondary evidence.

On pages 27 and 28 of his brief respondent makes the following contentions:

"The original books and documents were the best evidence and they should have been produced. Secondary evidence in lieu of the best evidence was properly excluded. See 9 Mertens, Law of Federal Income Taxation (1943), Secs. 50.76, 50.78; 4 Wigmore, Evidence (3rd Ed.), Sec. 1177 *et seq.*"

Under Sec. 50.6 in 9 Mertens, Law of Federal Income Taxation (1943), the following statement appears:

"The Board has accepted work sheets and copies from accountants who made a monthly audit for the purpose of establishing business income where the

books were lost; being the only evidence, the Board said that became the best evidence.”

It will be recalled that here the certified public accountant had made a complete audit and examination of all of the books and records of petitioner and in lieu of formal books which were not kept by the company at first he had substituted his work sheets or audit spread as the permanent records of petitioner. Those records were at all times available, but as shown in our opening brief, the Tax Court definitely refused to admit either the records or evidence by the certified public accountant of the contents of those records.

In note 35 on page 312 of the cited work the following appears:

“But see Murray Humphreys, 42 B. T. A. 857, in which oral testimony concerning the contents of books which could not be found was admissible. This decision has been aff’d in 125 F. 2d 340 (C. C. A. 7th, 1942).”

The reference to 4 Wigmore, Evidence (3rd Ed.), Sec. 1177 *et seq.*, is, of course, a general reference to the *best evidence* rule. We do not know to which paragraph or paragraphs among the numerous paragraphs appearing in the work, respondent specifically desires to call attention. Suffice it to say that there is nothing in Wigmore’s work on Evidence which upholds the rejection of secondary evidence under circumstances such as exist here, where respondent stipulated to the use of such secondary evidence.

On page 28 of his brief respondent next attempts to explain away the stipulation of counsel for respondent

during the hearing consenting to the introduction of secondary evidence. Respondent states: "Counsel for Commissioner did make a highly ambiguous statement."

That concession by respondent alone should entitle petitioner to the benefit of the stipulation for which it contends. Counsel for petitioner was led to believe and at all times thereafter was permitted to believe that respondent had waived the laying of a further foundation for the introduction of secondary evidence. It ill becomes respondent at this late stage of the proceedings to maintain that no such stipulation was intended. After counsel for respondent had obviously expressed acquiescence and consent to the introduction of secondary evidence without the necessity of laying a further foundation therefor, counsel for petitioner went on to explain that the secondary evidence would consist of his personal knowledge of certain documents which he had personally prepared.

After the interruption by the judge in the nature of an academic questioning of counsel for petitioner concerning the issues to be proved at the hearing, the proceedings were summarily terminated. Respondent claims that Mr. Steffes did not subsequently attempt to testify. It is difficult to express the feelings of counsel for petitioner in the condition of his then health, when confronted with the insurmountable obstacles presented by the rejection of all the "other evidence and testimony that were available" and the restricting of the proof to evidence which was then unavailable and the production of which in fact, had been waived by counsel for respondent.

It is our sincere opinion that this court is concerned with substance and not with mere technicalities of form.

IV.

Respondent's Contention That the Tax Court Did Not Err by Excluding Testimony of Taxpayer's Accountant as to the Contents of Taxpayer's Books or in Excluding Accountant's Working Papers in Lieu of Taxpayer's Books.

(Resp. Br. pp. 29 to 31.)

Once again respondent urges a technical objection as to the form of the offer. The record in this case shows clearly what transpired. The judge indicated forcefully and definitely his attitude toward the evidence with reference to the books of Mr. Sandrich, the certified public accountant. The evidence without any contradiction showed clearly that the records in question, long before these proceedings were commenced, had become the permanent records of petitioner. The detailed audit made by a competent certified public accountant are just as reliable, if not more reliable, than a formal set of secondary entries made by a bookkeeper. The purpose in making the audit was manifestly to ascertain, verify and certify with reference to the items constituting the business affairs of the corporation. It is our opinion that such audit records which have been adopted by the corporation as its own permanent records, long before any tax question arose, are deserving of the greatest weight.

On pages 29 and 30 of his brief respondent makes the following assertion and cites certain cases in support thereof:

“In any event, testimony by Mr. Sandrich as to the contents of taxpayer's books and records would have been properly excluded, if offered. The original books, records and documents, although admittedly

in existence, were not offered in evidence and Mr. Sandrich had not been engaged to audit the taxpayer's books until several years after the transaction involved took place. [R. 69-70, 72-73.] His testimony was clearly incompetent. See, *e. g.*, *Consolidated Coke Co. v. Commissioner*, 70 F. 2d 446 (C. C. A. 3d); *Greengard v. Commissioner*, 29 F. 2d 502 (C. C. A. 7th); *Chicago Railway Equipment Co. v. Commissioner*, 4 B. T. A. 452."

The case of *Consolidated Coke Co. v. Commissioner*, 70 F. (2d) 446 (C. C. A. 3rd), is certainly not in point. In that case the taxpayer had destroyed certain original resolutions and attempted to introduce copies thereof. The Board of Tax Appeals refused to admit the copies. In holding that the Board was justified under the circumstances in not accepting the explanation for the destruction of the original resolutions "after the notice of deficiency in this proceeding had been initiated," the Circuit Court of Appeals for the Third Circuit cited Wigmore on Evidence (2d Ed.), Sec. 1198. That section reads as follows:

"Sec. 1198. SAME: INTENTIONAL DESTRUCTION BY PROPONENT HIMSELF. If it should appear that the party desiring to prove a document had himself destroyed it, with the object of preventing its production in court, the evidence of its contents, which he might then offer, could properly be regarded as in all likelihood false or misleading (*ante*, Sec. 291). It is with this extreme case in mind that a few courts have inconsiderately laid down an unconditional rule that the proponent's intentional destruction of the document bars him from evidencing its contents in any other way: . . ."

Certainly there is nothing in this record which indicates any intentional destruction of records.

The holding in the case of *Greengard v. Commissioner, supra*, is not decisive since the facts in that case are entirely different from those existing here. The records which were there excluded had not been adopted by the taxpayer as permanent records long prior to the mailing of the deficiency notice, as in the instant case. A reading of the opinion in that case discloses its inapplicability without further argument.

The obvious distinction in the case of *Chicago Railway Equipment Company v. Commissioner*, 4 B. T. A. 452, is that "the (taxpayer's) auditor undertook to testify as to what the company's books contained relative to the original cost of the various properties owned by it" and "the books of account were not produced at the hearing nor were their contents offered in evidence in a competent manner." In the present case the entire records of petitioner reflecting each item in detail since the organization of the corporation were offered *in toto*, and the certified public accountant, who was also acting as co-counsel for petitioner, definitely indicated his intention to testify when he asked the following question of the court:

"Your Honor, isn't it a fact that a Certified Public Accountant having made a detailed audit of a concern, that his evidence and his findings are competent evidence as to sum totals and a general exposition of the evidence?"

At this point counsel for respondent made this assertion:

"We have no such problem before the Board. We have no accounting problem involved here."

To this the certified public accountant replied:

“Mr. Sandrich: We have a question of fact involved, questions which I myself, as the auditor, as a certified public accountant, went into and verified and built up my records therefrom, and it seems to me that those would be competent evidence.” [Tr. p. 104.]

It is quite obvious that petitioner was not attempting to offer the testimony of the certified public accountant without at the same time producing for the benefit of counsel for respondent and in court, the records of petitioner to which his testimony related. The court as it indicated was not interested in the details concerning numerous certificates each representing different amounts of shares of stock, but the court was primarily interested in the number of shares which Jack H. Smith and Otto F. Schwarts had received for the mining properties as compared to the total amount of shares that had been issued in consideration of the conveyance of the mining properties to petitioner.

The purpose of requiring production of a company's books concerning which an auditor attempts to testify, is manifestly to give the opposing party an opportunity of checking and determining whether the testimony offered conforms with what is actually recorded. That purpose was definitely accomplished when petitioner offered to produce its entire permanent records which had been set up for it by the certified public accountant, whose testimony was rejected.

Respondent at the bottom of page 30 of his brief states that:

“Mr. Sandrich was not offering the taxpayer’s books and records pertaining to the transfer; he was offering his own audit papers, derived from taxpayer’s records during an audit made several years after the transfer occurred.”

Respondent, however, is not correct in this contention. The evidence without any question shows that the records which were offered had been adopted by the corporation as its permanent records after those records had been set up by a certified public accountant. Respondent concludes this point with the following contention and quotation from the authority cited in support thereof:

“The offer was to submit all of the papers without selecting those that were relevant to the transaction. The papers offered were incompetent and the nature of the offer was improper. Under the circumstances, the Tax Court had no choice but to reject the offer. No error was committed.

“The following statement of the Board of Tax Appeals, in *Evergreen Cemetery Assn. v. Commissioner*, 25 B. T. A. 544, 551, is particularly appropriate:

“The proper trial of a case before the Board requires thorough preparation, a clear understanding of the issues, and the marshaling of the evidence in such a way as to indicate clearly the effect of the same and the issue to which it appertains. This is not accomplished by dumping into the hands of the Board a number of books of account and other similar

evidence. Such evidence is not self-illuminating. The Board should not be asked to ferret out the correct answer to technical or difficult questions of law and fact from unexplained, uncoordinated evidence.' " (Resp. Br. pp. 30 and 31.)

Even the quotation above shows that in the cited case an entirely different situation existed. Here petitioner was not "dumping into the hands of the Board a number of books of account and other similar evidence." Petitioner was not asking the court to digest those records and obtain a proper answer therefrom. Petitioner was offering the services of a certified public accountant who had prepared those records and who as indicated by the question which we have quoted above was ready, able and willing to give "sum totals." The production of the entire permanent records of the corporation was made not for the purpose of proving by those records directly the ultimate fact in dispute, but as a foundation for the expert testimony of a certified public accountant. As held in the case of *Chicago Railway Equipment Co. v. Commissioner*, *supra*, the production of such books and records were a condition precedent to the introduction of the testimony of the certified public accountant concerning their contents.

We submit that respondent has wholly failed to justify the exclusion of this most valuable and competent evidence and testimony.

V.

Respondent's Contention That the Tax Court Did Not Err in Denying Taxpayer's Motion to Re-open the Cause. (Resp. Br. pp. 31 to 33.)

We have sufficiently discussed the question of the refusal of the witnesses Maxfield and Wilton to testify to which respondent first alludes in his argument under this point. The primary point that we wish to discuss is the illness of Mr. Steffes.

Respondent states:

“ . . . ; that in spite of the alleged ‘misfortune’ Mr. Steffes took quite an active part in the hearing, making no mention of his illness, and stating instead that he was appearing in the case because of the health of Mr. Sandrich [R. 100, see also R. 97];”

We do not think that we owe an apology for not having included in the record some mention of the illness of Mr. Steffes. That illness was not caused by inaction but by the persistent refusal of counsel to stop working even though his physician had advised it. The collapse which took place the afternoon of the final day of the hearing was neither feigned nor unreal. We can only say that it is our sincerest hope that counsel for respondent who made the assertion above quoted, will not themselves be compelled to undergo the same effects which for more than one year followed thereafter.

Respondent refers to the “excusable neglect” in counsel’s failing to produce the documentary evidence in question. Counsel’s explanation for not having produced those documents was interrupted by counsel for respondent who immediately thereafter, as we have shown above, waived

all objections to the use of secondary evidence. Since the Tax Court restricted the proof to the one type of evidence that was not present in court, even though the production of that evidence was waived by counsel for respondent, petitioner should have been accorded the opportunity of producing that evidence. It is our sincere belief that if this hearing had been had in Washington where the Tax Court is in session at all times, a short continuance of the hearing would have been granted for the purpose of enabling petitioner to be heard on the merits. We make this statement with all due respect to the judge who presided at the hearing. His stay, however, in Los Angeles was limited, and undoubtedly the time allotted for that stay had already been completely allotted to other matters. We trust that the effects of this situation can and will be remedied by a proper order of this court.

The case of *Bankers Coal Co. v. Burnet*, 207 U. S. 308, 313, cited by respondent is not in point since there an entirely new point was attempted to be raised. The opinion requires no explanation to show the distinction which exists between that case and the present case.

The case of *Hughes v. Commissioner*, 104 F. (2d) 144, decided by this court, is likewise no authority for respondent's position. From what is stated in the opinion of the court the record did not disclose the basis of the court's ruling. It is our contention that each case must rest upon its own facts. Here there is no justification for the refusal of the Tax Court to grant a further hearing on this issue.

The case of *Scott v. Commissioner*, 117 F. (2d) 36, 40 (C. C. A. 8th) likewise relates to certain new facts which did not ever come "to the attention of the petitioner . . . or either of the petitioners in the two related cases until

some time subsequent to the Board's decision." A mere reading of the cited case discloses an entirely different set of facts and circumstances.

In the case of *O'Rear v. Commissioner*, 80 F. (2d) 473 (C. C. A. 6th) new issues were attempted to be injected into the proceedings by way of a motion to reopen the cause for further hearing. In the present case the original issue was the one upon which petitioner desired an opportunity to produce the evidence that was unavailable at the time of the hearing.

At the bottom of page 32 of his brief respondent cites the case of *Crane-Johnson Co. v. Commissioner*, 105 F. (2d) 740 (C. C. A. 8th) to the effect that "the taxpayer had its day in court." A similar statement was made in the portion of the brief of respondent contained on pages 23 to 25 thereof which we stated that we would answer at the conclusion of this brief. We shall, therefore, refer to and answer the former portion of the brief at this point and shall distinguish the cited case.

At the bottom of page 22 of his brief respondent states:

"The taxpayer was afforded a full and complete opportunity to present its case to the Tax Court and failed to do so. It is not entitled to a repeat performance in order that it may seek to remedy the mistakes of its counsel."

He cites the case of *Crane-Johnson Co. v. Commissioner*, 105 F. (2d) 740, 744 (C. C. A. 8th) affirmed 311 U. S. 54.

The situation in that case was entirely different from that existing here. The sole question there determined was whether the Board of Tax Appeals had abused its discretion in refusing a second hearing wherein the tax-

payer could be represented by an attorney, and where at the first hearing, the taxpayer was represented by a certified public accountant. The following language taken from the opinion discloses that the point was apparently abandoned by the taxpayer and the petition for review was prosecuted on more substantial grounds:

“In the list of points to be argued in petitioner’s brief appears the point that the Board should have granted the petition for rehearing. The matter is not referred to in the body of the brief and should probably be treated as abandoned. It is, however, referred to in certain briefs filed *amicus curiae*.”

No question was raised in that case and certainly none was argued that the taxpayer had not been accorded a full and complete opportunity to be heard at the hearing in which he was represented by the certified public accountant. The only question attempted to be raised was whether the certified public accountant, in appearing for the taxpayer, was engaged in the unlawful practice of law in the District of Columbia.

None of the questions involved there were involved here. Petitioner here was not afforded a full or complete opportunity to present its case to the Tax Court. As appears from a consideration of the entire record in this case, the petitioner was hedged in at every turn by objections made by respondent that were sustained by the Tax Court. As we have indicated above, the legal issue was so simple that it could have been determined in one of several ways. The means to supply this proof were available in court. Those means were rejected by the court and the proof was arbitrarily limited to a particular means that was not available at the time.

In closing the argument in his brief respondent suggests a comparison of the case last mentioned above, with the case of *Chatham Phenix Nat. Bank and Trust Co. v. Helvering*, 87 F. (2d) 547 (App. D. C.), cited by us in our opening brief. We ourselves particularly invite this court's attention to the statement of the humane principles set forth on page 550 of the opinion. We earnestly maintain that we have brought ourselves within the purview of the legal and equitable principles there set forth.

Conclusion.

The decision of the Tax Court should be reversed with instructions to grant to petitioner a further hearing on the issue of depletion in the interests of substantial justice.

Respectfully submitted,

A. P. G. STEFFES,

Attorney for Petitioner.

No. 10764

United States
Circuit Court of Appeals
For the Ninth Circuit. 5

THE APACHE LAND AND CATTLE COM-
PANY, a corporation,

Appellant,

vs.

THE FRANKLIN LIFE INSURANCE COM-
PANY, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Arizona

FILED

JUL - 15 1944

PAUL P. O'BRIEN,
CLERK

No. 10764

United States
Circuit Court of Appeals
For the Ninth Circuit.

THE APACHE LAND AND CATTLE COM-
PANY, a corporation,

Appellant,

vs.

THE FRANKLIN LIFE INSURANCE COM-
PANY, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Arizona

1940年11月11日 星期一 晴

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer	8
Appeal:	
Bond on	51
Certificate of Clerk to Transcript of Record on	55
Designation of Additional Record on	53
Designation of Record on	52
Notice of	50
Statement of Points on	57
Bond on Appeal	51
Certificate of Clerk to Transcript of Record on Appeal	55
Complaint	2
Designation of Additional Record on Appeal..	53
Designation of Record on Appeal	52
Judgment, Summary	46
Minute Order of Wednesday, Jan. 26, 1944, Granting Motion for Summary Judgment ..	45

Motion for Summary Judgment, with Attached Documents	14
Names and Addresses of Attorneys	1
Notice of Appeal	50
Reply to Answer	12
Statement of Points on Appeal	57
Summary Judgment	46

ATTORNEYS OF RECORD

ARMSTRONG, KRAMER, MORRISON &
ROCHE

First National Bank Building,
Phoenix, Arizona.

GUY AXLINE

Holbrook, Arizona.

Attorneys for Plaintiff.

FENNEMORE, CRAIG, ALLEN & BLEDSOE

Phoenix National Bank Bldg.,
Phoenix, Arizona.

Attorneys for Defendants. [1*]

In the Superior Court of the State of Arizona In
and For the County of Apache.

No. 2323

Civ-67 Pret.

THE APACHE LAND AND CATTLE COM-
PANY, a Corporation,

Plaintiff,

vs.

THE FRANKLIN LIFE INSURANCE COM-
PANY, a Corporation; JOHN DOE, JANE
DOE and DOE-ROE Company, a Corporation;
and all the Heirs, Unknown Heirs, Executors,
Administrators, Successors-in-Interest or As-
signs of any of the Above Named Parties,
Defendants.

COMPLAINT

Comes now the Plaintiff, The Apache Land and
Cattle Company, a Corporation, and complains and
alleges as follows:

I.

That Plaintiff, The Apache Land and Cattle Com-
pany, is a Corporation organized and existing under
and by virtue of the laws of the State of Colorado,
and is now, and has been during the times here-
inafter mentioned, duly authorized to transact busi-
ness within the State of Arizona;

That the Defendant, The Franklin Life Insur-
ance Company, is a corporation organized and ex-

isting under and by virtue of the laws of the State of Illinois;

That the true names of John Doe, Jane Doe and Doe-Roe Company, a Corporation, their Heirs and Successor-in-Interest, are unknown to this Plaintiff; and should any of them appear in this action as parties-defendant, this Plaintiff requests permission to substitute their true names.

II.

That Plaintiff is the owner in fee simple of the following described real property:—situate in the County of Apache, [2] State of Arizona:

Sections One (1), Three (3), Five (5), Seven (7), Nine (9), Eleven (11), Thirteen (13), Fifteen (15), Seventeen (17), Nineteen (19), Twenty-one (21) and Twenty-three (23), All in Township Seventeen (17) North, Range Twenty-five (25) East:

Sections One (1), Three (3), Five (5), Nine (9), Eleven (11), Thirteen (13), Fifteen (15), Seventeen (17), Twenty-one (21), Twenty-three (23), Twenty-five (25), Twenty-seven (27), Twenty-nine (29), Thirty-three (33) and Thirty-five (35), all in Township Eighteen (18) North, Range Twenty-five (25) East;

All of odd numbered sections and parts of odd numbered sections lying south and east of the thread of the stream of the Rio Puerco of the West and South of the Southern limit of the right of way of the Atlantic & Pacific Railroad, to-wit:

Sections One (1), Eleven (11), Thirteen (13), Fifteen (15), Twenty-one (21), Twenty-three (23),

Twenty-five (25), Twenty-seven (27), Thirty-three (33), and Thirty-five, all in Township Nineteen (19), North, Range Twenty-five (25) East;

Sections One (1), Three (3), Five (5), Seven (7), Nine (9), Eleven (11), Thirteen (13), Fifteen (15), Seventeen (17), Nineteen (19), Twenty-one (21), and Twenty-three (23), all in Township Seventeen (17) North, Range Twenty-six (26) East;

Sections One (1), Three (3), Five (5), Seven (7), Nine (9), Eleven (11), Thirteen (13), Fifteen (15), Seventeen (17), Nineteen (19), Twenty-one (21), Twenty-three (23), Twenty-five (25), Twenty-seven (27), Twenty-nine (29), Thirty-one (31), Thirty-three (33), and Thirty-five (35); all in Township Eighteen (18) North, Range Twenty-six (26) East;

Sections One (1), Three (3), Five (5), Seven (7), Nine (9), Eleven (11), Thirteen (13), Fifteen (15), Seventeen (17), Nineteen (19), Twenty-one (21), Twenty-three (23), Twenty-five (25), Twenty-seven (27), Twenty-nine (29), Thirty-one (31), Thirty-three (33), and Thirty-five (35), all in Township Nineteen (19) North, Range Twenty-six (26) East;

All of the odd numbered sections and parts of sections lying south and east of the thread of the stream of the Rio Puerco of the west and south of the right of way of the Atlantic and Pacific Railroad, in Township Twenty (20), Range Twenty-six (26) East, to-wit: Sections Twenty-three (23), Twenty-five (25), Twenty-seven (27), Thirty-one (31), Thirty-three (33), and Thirty-five (35), in

Township Twenty (20) North, Range Twenty-six (26) East;

The West One-half of Section Twenty-six (26), Township Twenty (20) North, Range Twenty-six (26) East, 320 acres, (This land is known as the land purchased [3] from Ferdinand V. Barber and Mary A. Barber, and known as the Barber Homestead).

The West one-half of the Southwest Quarter and South one-half of the Northwest Quarter of Section Twelve (12), Township Nineteen (19) North Range Twenty-five (25) East, 160 acres. (This land is known as the Loy C. Turbeville homestead.)

The Southwest Quarter of the Northwest Quarter of Section Thirty-four (34), Township Eighteen (18) North, Range Twenty-six (26) East, 40 acres. (This land is known as the James E. Porter Railroad Land Strip.)

That fractional part of the North half of the Northeast Quarter; the Southeast Quarter of the Northeast Quarter and the Northeast Quarter of the Northwest Quarter of Section Twenty-eight (28), Township Twenty (20) North, Range Twenty-six (26) East of the G. & S. R. M., lying South and East of the Atchison, Topeka and Santa Fe Railroad Company's right of way (and containing 40 acres, more or less);

Together with all appurtenances thereto and improvements thereon, and with all rights to the use of water and easements for the carriage of water for use in irrigating said premises.

III.

That the Plaintiff is credibly informed and believes, and therefore alleges the fact to be, that the Defendants above named, and each of them, make some claim in and to the above described real property adverse to this Plaintiff;

That the claims of the Defendants, and each of them, are without right; and that Defendants, and each of them, have no right, title, claim and interest in or to the said real property hereinabove described, or any part thereof;

That Plaintiff's estate is derived from the United States of America and the State of Arizona, through its predecessors in interest.

Wherefore, Plaintiff prays judgment as follows:

1. That the Defendants, and each of them, be required to set forth the nature of their claims; and that all adverse claims be determined by a decree of this Court;

2. That by Judgment and Decree it be ordered, adjudged and [4] decreed that the Plaintiff is the owner in fee simple of the real property hereinabove described; and that its estate be established against the adverse claims of the Defendants, and each of them; that all of said Defendants be barred and forever estopped from having, or claiming, any right or title adverse to the Plaintiff in or to said premises, or any part thereof;

3. For such other and further relief as to the Court may seem just and proper.

ARMSTONG, KRAMER, MOR-
RISON & ROCHE

By J. E. MORRISON

First National Bank Build-
ing

Phoenix, Arizona.

GUY AXLINE

Holbrook, Arizona

Attorneys for Plaintiff.

State of Arizona,

County of Maricopa—ss.

Harry Jamison, being first duly sworn, on his oath deposes and says: That he is the President of the Apache Land and Cattle Company, Plaintiff in the foregoing and above entitled Cause, and makes this verification for and in its behalf; that he has read the foregoing Complaint and knows the contents thereof; that the matters and things therein alleged are true, both in substance and in fact, except as to those matters alleged on information and belief, and as to those matters he believes it to be true.

HARRY JAMISON

Subscribed and sworn to before me this 15th day of June, A. D. 1942.

(Notarial seal) GLADYS PERRY

Notary Public

My com. exp. Oct. 28, 1945. [5]

[Endorsed]: Filed Aug. 19, 1942. [6]

[Title of District Court and Cause.]

ANSWER OF THE FRANKLIN LIFE INSURANCE COMPANY, A CORPORATION

Comes now the defendant The Franklin Life Insurance Company, a corporation, and for its answer to plaintiff's complaint admits, denies and alleges as follows:

I.

Admits the allegations of paragraph I of said complaint, except the allegations as to John Doe, Jane Doe and Doe-Roe Company, a corporation, and as to those allegations this answering defendant has no information and therefore denies the same;

II.

Denies the allegations of paragraph II of said complaint;

III.

Admits that this defendant makes claim in and to the real property described in plaintiff's complaint, and denies that the claim of this defendant is without right, and denies that this defendant has no right, title, claim and interest in and to the said real property as alleged in paragraph III of plaintiff's complaint; [7]

IV.

Denies each and every allegation of said complaint not herein specifically admitted;

V.

As and for an affirmative defense to plaintiff's complaint, this defendant alleges as follows:

(a) That this defendant is the owner in fee simple and in possession of the real estate described in plaintiff's complaint, and of each part and parcel thereof;

(b) That this defendant's title thereto was acquired in the following manner, to wit: That on or about July 1, 1930, plaintiff above named was the owner in fee simple of the property described in plaintiff's complaint, and being justly indebted to this defendant in the sum of one hundred forty thousand dollars (\$140,000.00) made, executed and delivered to this defendant its realty mortgage mortgaging the property described in plaintiff's complaint to secure the payment of said indebtedness; that thereafter and on or about the 19th day of February, 1938, payment of said indebtedness being in default, this defendant commenced an action for the foreclosure of said mortgage against plaintiff herein in the Superior Court of the State of Arizona, in and for the County of Apache, in which said action, pursuant to due and regular proceedings therefor, judgment of foreclosure and sale of the real estate described in plaintiff's complaint herein was duly and regularly entered on or about August 17, 1940, and pursuant to said judgment of foreclosure and sale the said real estate was thereafter duly and regularly sold under special execution by the Sheriff of Apache County to this defendant for the sum of one hundred and fifty thousand dollars (\$150,000.00), and thereafter and on or about the 12th day of April, 1941, no re-

demption from said Sheriff's sale having been made as required [8] by law, the said Sheriff of Apache County duly made, executed and delivered his Sheriff's Deed to said real estate to this defendant, and that this defendant thereupon became and ever since has been and now is the owner in fee simple and in possession of said real estate so sold to this defendant under foreclosure, being the real estate described in plaintiff's complaint herein;

VI.

That plaintiff has no right, title, claim or interest in or to the said real property described in plaintiff's complaint, or any part thereof.

Wherefore, having fully answered, this defendant prays that plaintiff's complaint be dismissed, for its costs herein incurred, and for such other and further relief as to the Court may seem just and proper.

FENNEMORE, CRAIG, ALLEN
& BLEDSOE,

By RICHARD FENNEMORE

Attorneys for Defendant

The Franklin Life Insurance
Company, a corporation.

State of Arizona,
County of Maricopa—ss.

Richard Fennemore, being first duly sworn on his oath deposes and says:

That he is one of the attorneys for the defendant The Franklin Life Insurance Company, a corpora-

tion, and makes this affidavit for and on behalf of said defendant; that he has read plaintiff's complaint and knows the contents thereof, and has read the foregoing answer and knows the contents thereof; that the matters and things alleged in plaintiff's complaint which are denied in said answer are untrue, and that the matters and things alleged in the foregoing answer are true except as to matters [9] alleged on information and belief, and as to those matters he believes said answer to be true.

RICHARD FENNEMORE

Subscribed and sworn to before me this 21st day of August, 1942.

[Seal]

ELAINE JONES

Notary Public.

My commission expires: August 5, 1944.

Received copy of the above Answer this 24 day of August, 1942.

GUY AXLINE

ARMSTRONG, KRAMER, MOR-
RISON & ROCHE,

By J. E. MORRISON,

Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 24, 1942. [10]

[Title of District Court and Cause.]

REPLY TO ANSWER OF THE FRANKLIN
LIFE INSURANCE COMPANY, A CORPO-
RATION

Comes now the plaintiff The Apache Land and Cattle Company, a corporation, and, leave of Court having been first had and obtained, files this its reply to the answer of the defendant, The Franklin Life Insurance Company, a corporation, on file herein, and alleges:

I.

That the defendant The Franklin Life Insurance Company is a foreign corporation organized under and by virtue of the laws of the State of Illinois.

II.

That at all of the times and dates specified and referred to in the fifth paragraph of said defendant's answer, and for many years thereafter down to May 28, 1941, the defendant The Franklin Life Insurance Company, a foreign corporation as aforesaid, had wholly failed to qualify to do business in the State of Arizona as required by the statute in such case made and provided.

III.

That at all of the times and dates specified and referred [11] to in said Paragraph V of defendant's answer, and for a long time thereafter, the said defendant was engaged in an enterprise of permanence and durability in the State of Arizona

and did transact within the State of Arizona a substantial part of its ordinary business, and therefore each and all of the acts of the defendant, The Franklin Life Insurance Company, set up in the complaint were and are wholly void.

Wherefore, plaintiff prays judgment that it be ordered, adjudged and decreed that plaintiff, The Apache Land and Cattle Company, is the owner in fee simple of all the real estate described in its complaint, and that the defendants have no claims whatsoever adverse to the title of the plaintiff, and that said answering defendant be barred and forever estopped from having or claiming any right, title or interest adverse to the plaintiff in and to the said premises or any part thereof.

GUY AXLINE,

Holbrook, Ariz.

ARMSTRONG, KRAMER,

MORRISON & ROCHE,

J. E. MORRISON,

First National Bank Bldg.,

Phoenix, Ariz.

Attorneys for Plaintiff.

Received Copy July 6, 1943.

FENNEMORE, CRAIG, ALLEN

& BLEDSOE,

Attorneys for defendant.

[Endorsed]: Filed July 6, 1943. [12]

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Comes now the defendant The Franklin Life Insurance Company, a corporation, being the only defendant who has been served with process in the above-entitled action, and moves for a Summary Judgment in its favor upon plaintiff's complaint upon the ground that there is no genuine issue as to any material fact and that this defendant is entitled to said Judgment as a matter of law.

This motion is made upon the pleadings on file and upon the following documents herewith presented:

1. Certified copy of Judgment and Decree.
2. Certified copy of Sheriff's Certificate of Sale of real estate.
3. Certified copy of Execution and Order of Sale.
4. Certified copy of Sheriff's Return of Execution and Order of Sale of real property.
5. Verified copy of Sheriff's Deed, the original of which will be produced upon the hearing on this motion. [13]

Each of said documents being in that certain action heretofore filed in the Superior Court of Apache County, State of Arizona, numbered therein, No. 2065, in which The Franklin Life Insurance Company, a corporation, this defendant, was plaintiff, and The Apache Land and Cattle Company, a corporation, plaintiff above named, was defendant.

Dated, October 27, 1943.

FENNEMORE, CRAIG, ALLEN
& BLEDSOE,

By RICHARD FENNEMORE,
202 Phoenix National Bank
Bldg., Phoenix, Arizona.
Attorneys for defendant, The
Franklin Life Insurance
Company, a corporation.

Received copy of the within Motion for Summary
Judgment this 27th day of October, 1943.

ARMSTRONG, KRAMER,
MORRISON & ROCHE,
GUY AXLINE,

By J. E. MORRISON,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 27, 1943. [14]

50050

1.

In the Superior Court
Of Apache County, State of Arizona

CLERK'S CERTIFICATE OF COURT
RECORD

State of Arizona,
County of Apache,—ss.

I, Myrlan G. Brown, Clerk of the Superior Court
of the State of Arizona, in and for the County of
Apache, do hereby certify that the attached and

foregoing is a true and correct Copy of the Original Judgment and Decree, Civil No. 2065 as the same appears of record in my office, and of the whole thereof.

In Witness Whereof, I have hereunto set my hand and the official seal of this Court this day of, 19.....

[Seal]

MYRLAN G. BROWN,

Clerk of said Superior Court.

[Endorsed]: Filed. Walter S. Wilson, Clerk,
by Ernest R. Morris, Deputy. Dec. 30, 1941. [15]

In the Superior Court of the State of Arizona,
in and for the County of Apache

No. 2065

THE FRANKLIN LIFE INSURANCE COM-
PANY, a Corporation,

Plaintiff,

vs.

THE APACHE LAND AND CATTLE COM-
PANY, a Corporation,

Defendant.

JUDGMENT AND DECREE

Now on this 17th day of August, 1940, comes the above named plaintiff by its attorneys Henry H. Clark of Denver, Colorado, and Earl Platt of St.

Johns, Arizona, and prays the court for relief as follows:

(1) That judgment be forthwith entered in the above entitled action in favor of the plaintiff, and against the defendant in the total sum of Two Hundred Twenty Five Thousand Dollars (\$225,000.00), plus the costs as taxed in this case; (2) for a decree ordering the sale of the mortgaged lands and premises hereinafter described under foreclosure proceedings; and (3) for such other and further relief in the premises as to the court may seem meet and proper.

And it appearing to the court from the records and files in said action as follows, to-wit:

1. That said plaintiff filed its complaint therein against the above named defendant on the 19th day of February, 1938, wherein it prayed for judgment against defendant on certain promissory notes dated July 1, 1930, and for subsequent money advancements, in the total principal sum of \$150,820.77, together with interest thereon at the rate of seven per cent (7%) per [16] annum from the date of said notes, and from the dates of said several money advancements to defendant, and for the allowance by the court of a reasonable attorney's fee for services rendered in these foreclosure proceedings, and for other relief as set forth in said complaint;

2. That given to secure the payment of said indebtedness of said defendant under date of July 1st, 1930, was a certain mortgage on the lands and premises situated in the County of Apache, Arizona,

as specifically described in "Exhibit A" attached to said complaint, and as hereinafter set forth;

3. That since the filing of said complaint the plaintiff has made certain other money advancements to defendant, or to others for its use and benefit, for the payment of taxes on the mortgaged premises and for other necessary and proper items of expense in the total net sum of \$6,563.43, making the total net sum of all such money advancements \$17,384.20 as set forth in plaintiff's supplemental complaint filed herein;

4. That under date of February 21, 1938, a summons was issued by the Clerk of this Court in the above entitled action, and that under date of March 10, 1938, said defendant by endorsement thereon acknowledged and accepted service of the same, and that no appearance has been entered therein by said defendant, or any pleading filed in its behalf, excepting only a "Confession of Judgment" for the total principal sum of \$225,000.00, dated July 6, 1940, and wherein it is stipulated and agreed that upon the entry of a judgment for the said sum the court may also enter an order and decree directing the sale of said mortgaged lands and premises as under foreclosure, in accordance with the laws of the State of Arizona, and the application of the proceeds thereof to the satisfaction, as far as possible, of said indebtedness after the payment of all proper costs and charges arising in connection with said sale and the costs of said action.

Now, Therefore, the Court Doth Find as Follows, To-wit: (1) That all of the allegations and averments contained in the complaint and in the supplemental complaint are true; (2) that defendant is indebted to plaintiff in the total agreed sum as aforesaid of \$225,000.00, and that plaintiff is entitled to have judgment entered in said action for said sum; (3) that plaintiff is entitled to an order and decree directing the sale of the mortgaged lands and premises described in said complaint, and the application of the proceeds, as far as possible, to the satisfaction of the judgment to be entered upon said indebtedness.

It Is Therefore Ordered, Adjudged and Decreed as Follows:

1. That plaintiff do have and recover of defendant the sum of \$225,000.00, with costs of this action, and that judgment therefor be forthwith entered herein;

2. That the said mortgaged lands and premises be sold at public auction in accordance with the laws of the State of Arizona and the proceeds thereof applied to the satisfaction, as far as possible, of said judgment, after the payment of all proper costs and charges arising in connection with said sale and the costs of this action;

3. That a special execution be forthwith issued to the sheriff of Apache County, directing him to seize and sell at public auction the said lands and premises under execution for the purposes aforesaid, and that such sale be conducted by the sheriff at the front door of the Court House of said county

on Monday, the 7th day of October, 1940, pursuant to the laws of the State of Arizona, to the highest and best bidder therefor;

4. That notice of sale so ordered as aforesaid shall be made by posting a notice thereof in three public places in said Apache County, one of which shall be at the Court House door, for not less than fifteen days successively before the date of sale, and by publishing a copy thereof for three weeks before such date [18] in a newspaper of general circulation published in said county, which notice shall state the judgment entered and the amount thereof, and the court in which it was rendered, and the name of the parties to said action, and shall particularly describe the lands and premises to be sold as aforesaid, and as hereinafter specified.

5. That upon the conclusion of such sale said sheriff shall issue his certificate of purchase to said highest and best bidder for the same, who has paid cash therefor, and upon the expiration of six months from the date of said sale said sheriff shall execute and deliver to such purchaser, or his assigns, his deed therefor, provided that in the meantime defendant has not redeemed said lands and premises from such sale by paying the amount bid at said sale, plus interest at the legal rate to the person or persons entitled to the same, or to the plaintiff herein, if plaintiff at said sale bids the same in its own behalf, and applies the amount of its bid as a credit on said judgment; that upon the expiration of said period of redemption, and if said defendant has not redeemed the same the said

purchaser or the plaintiff, as the case may be, shall be entitled to the immediate possession of all of said lands and premises, and unless such possession is promptly yielded by defendant to plaintiff, or its assigns, upon demand, the court shall thereupon order the issuance of a writ of possession placing the purchaser, or its assigns, or the plaintiff, as the case may be, in possession thereof;

6. That said sheriff shall apply the proceeds of said sale, first: In payment of the costs of said sale and of this action; second: In payment to plaintiff of the amount found to be due it in the aforesaid judgment; and third: the residue if any there be, shall be paid over to said defendant, or its assigns.

7. That from and after the sale of said lands and premises, under and by virtue of this judgment and decree, said defendant, and all persons claiming under said defendant since the [19] commencement of this action be, and they and each of them are, hereby forever barred and foreclosed of and from all lien upon, right, title, interest or estate of, in or to said lands and premises, or any part thereof, except only as to the exercise of the right of redemption hereinbefore referred to.

8. That the lands and premises to be sold as aforesaid are described as follows:

(a) Sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, and 23, all in Tp. 17 N, R. 25 East;

(b) Sections 1, 3, 5, 9, 11, 13, 15, 17, 21, 23, 25, 27, 29, 33, and 35, all in Tp. 18 N, R. 25 East;

(c) All of odd numbered sections and parts of

odd numbered sections lying south and east of the thread of the stream of the Rio Puerco of the West and South of the Southern limit of the right of way of the Atlantic and Pacific Railroad, to-wit: Sections 1, 11, 13, 15, 21, 23, 25, 27, 33, and 35, all in Tp. 19 N, R. 25 East;

(d) Sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, and 23, all in Tp. 17 N, R. 26 East;

(e) Sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, and 23, all in Tp. 17 N, R. 26 East;

(f) Sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35, all in Tp. 19 N, R. 26 East;

(g) All of the odd numbered sections and parts of sections lying south and east of the thread of the stream of the Rio Puerco of the West and South of the right of way of the Atlantic and Pacific Railroad, in Tp. 20, R. 26 East, to-wit: Sections 23, 25, 27, 31, 33, and 35, Tp. 20 N, R. 26 East;

(h) The west one-half of Section 26, Tp. 20 N, R. 26 East;

(i) The west one-half of the SW $\frac{1}{4}$ and south one-half of the NW $\frac{1}{4}$ of Section 12, Tp. 19 N, R. 25 East;

(j) The SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 34, Tp. 18 N, R. 26 East;

(k) That fractional part of the N $\frac{1}{2}$ of the NE $\frac{1}{4}$; the SE $\frac{1}{4}$ of the NE $\frac{1}{4}$ and the NE $\frac{1}{2}$ of the NW $\frac{1}{4}$ of Section 28, Tp. 20 N, R. 26 East of the G. & S. R. M. lying south and east of the Atchison and Topeka and Santa Fe Railroad Company's right of way, containing 40 acres, more or less;

(1) Also all appurtenances thereto and improvements thereon, together with all rights to the use of water and easements for the carriage of water for use in irrigating said lands and premises, and also all shares of stock and shares of water and water rights, in any ditch or irrigation [20] company or water users' association which may in any manner now or hereafter entitle the owner of said premises to water for irrigating same.

* * * * *

Done in Open Court.

By the Court.

LEVI S. UDALL,

Judge. [21]

50050

2.

In the Superior Court of the State of Arizona,
in and for the County of Apache

No. 2065

THE FRANKLIN LIFE INSURANCE COM-
PANY, a Corporation,

Plaintiff,

vs.

THE APACHE LAND AND CATTLE COM-
PANY, a Corporation,

Defendant.

SHERIFF'S CERTIFICATE OF SALE OF
REAL ESTATE

I, John Nunn, Sheriff of the County of Apache, State of Arizona, do hereby certify that under and by virtue of an Execution and Order of Sale issued in the above entitled cause, duly attested the 28th day of August, 1940, by which I was commanded to make the amount of Two Hundred Twenty-five Thousand Dollars (\$225,000.00) to satisfy the Judgment in this action, together with Plaintiff's costs and accruing costs out of the real property belonging to the above named Defendant and set forth and described in said Execution and Order of Sale, I have on this day sold at public auction, according to the statute in such case made and provided, to The Franklin Life Insurance Company who was the highest and best bidder therefor, for the sum of One Hundred and Fifty Thousand Dollars

(\$150,000.00), which was the whole sum bid by said Company, as being in full satisfaction of said Judgment, the real property set forth in said Execution and Order of Sale, and particularly described as follows, to-wit:

(a) Sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, and 23, all in Twp. 17 N., R. 25 East;

(b) Sections 1, 3, 5, 9, 11, 13, 15, 17, 21, 23, 25, 27, 29, 33, and 35, all in Twp. 18 N., R. 25 East;

(c) All of odd numbered sections and parts of odd numbered sections lying south and east of the thread of the stream of the Rio Puerco of the West and South of the Southern limit of the right of way of the Atlantic and Pacific Railroad, to-wit: Sections 1, 11, 13, 15, 21, 23, 25, 27, 33, and 35, all in Twp. 19 N. R. 25 East; [22]

(d) Sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, and 23, all in Twp. 17 N., R. 26 East;

(e) Sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35, all in Twp. 18 N. R. 26 East;

(f) Sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35, all in Twp. 19 N. R. 26 East;

(g) All of the odd numbered sections and parts of sections lying south and east of the thread of the stream of the Rio Puerco of the West and South of the Right of way of the Atlantic and Pacific Railroad, in Twp. 20, R. 26 East, to-wit: Sections 23, 25, 27, 31, 33, and 35, Twp. 20 N. R. 26 East;

(h) The west one-half of Section 26, Twp. 20 N., R. 26 East;

(i) The west one-half of the SW $\frac{1}{4}$ and south one-half of the NW $\frac{1}{4}$ of Section 12, Twp. 19 N. R. 25 East;

(j) The SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 34, Twp. 18 N., R. 26 East;

(k) That fractional part of the N $\frac{1}{2}$ of the NE $\frac{1}{4}$; the SE $\frac{1}{4}$ of the NE $\frac{1}{4}$ and the NE $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 28, Twp. 20 N., R. 26 East of the G. & S. R. M. lying south and east of the Atchison and Topeka and Santa Fe Railroad Company's right of way, containing 40 acres, more or less;

(l) Also all appurtenances thereto and improvements thereon, together with all rights to the use of water and easements for the carriage of water for use in irrigating said lands and premises, and also all shares of stock and shares of water and water rights, in any ditch or irrigation company or water users' association which may in any manner now or hereafter entitle the owner of said premises to water for irrigating same.

And I further certify that I offered for sale the above described real property as a whole, that being the manner in which the judgment debtor directed that the same be sold.

And that said real property is subject to redemption in lawful money of the United States of America pursuant to the statute in such cases made and provided.

Given under my hand this 7th day of October,
A. D. 1940.

JOHN NUNN,
Sheriff.

By
Deputy Sheriff. [23]

State of Arizona

County of Apache,—ss.

I, Joyce U. Colter, County Recorder of Apache County, Arizona, do hereby certify that the foregoing instrument is a full, true and correct copy of the Sheriffs Certificate of sale of Real Estate executed by John Nunn, Sheriff of Apache County in favor of The Franklin Life Insurance Company and recorded Jan. 15th, 1941, in Book 4 of N. A. R. E. at Page 498, Records of Apache County, Arizona.

Witness my hand and Official Seal this 25 day of September, 1941.

[Seal] JOYCE U. COLTER,
County Recorder.

[Endorsed]: Filed Walter S. Wilson, Clerk, by Ernest R. Morris, Deputy, Dec. 30, 1941. [24]

50050

3.

In the Superior Court
Of Apache County, State of Arizona

State of Arizona,
County of Apache,—ss.

CLERK'S CERTIFICATE OF COURT
RECORD

I, Myrlan G. Brown, Clerk of the Superior Court of the State of Arizona, in and for the County of Apache, do hereby certify that the attached and foregoing is a true and correct Copy of the Original Execution and Order of Sale, Civil No. 2065 as the same appears of record in my office, and of the whole thereof.

In Witness Whereof, I have hereunto set my hand and the official seal of this Court this 25 day of Sept., 1941.

[Seal]

MYRLAN G. BROWN,

Clerk of said Superior Court.

[Endorsed]: Filed. Walter S. Wilson, Clerk,
by Ernest R. Morris, Deputy, Dec. 30, 1941. [25]

In the Superior Court of the State of Arizona,
in and for the County of Apache

No. 2065

THE FRANKLIN LIFE INSURANCE COM-
PANY, a Corporation,

Plaintiff,

vs.

THE APACHE LAND AND CATTLE COM-
PANY, a Corporation,

Defendants.

EXECUTION AND ORDER OF SALE

The State of Arizona, to the Sheriff or Any Con-
stable of Apache County, Arizona, Greetings:

Whereas, on the 17th day of August, 1940, The Franklin Life Insurance Company, a corporation, recovered a Judgment in the Superior Court of Apache County, State of Arizona, against The Apache Land and Cattle Company, a corporation, for the principal sum of \$150,820.77, which included money subsequently advanced, together with interest thereon at the rate of 7% per annum from the date of the execution of said notes, and from the dates of the several advancements to the Defendant, and for reasonable attorneys fees for services rendered in the foreclosure proceedings, all in the total sum of Two Hundred Twenty-five Thousand Dollars (\$225,000.00), together with Plaintiff's costs of suit and all accruing costs, including costs

of sale, together with a foreclosure of Plaintiff's Mortgage lien against the Defendant upon the following described premises, to-wit:

(a) Sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, and 23, all in Township 17 North, Range 25 East;

(b) Sections 1, 3, 5, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 33, and 35, all in Tp. 18 N. R. 25 East;

(c) All of odd numbered sections and parts of odd numbered sections lying south and east of the thread of the stream of the Rio Puerco of the West and South of the Southern limit of the right of way of the Atlantic and Pacific Railroad, to-wit: Sections 1, 11, 13, 15, 21, 23, [26] 25, 27, 33, and 35, all in Tp. 19 N, R. 25 East;

(d) Sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, and 23, all in Tp. 17 N, R. 26 East;

(e) Sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 all in Tp. 19 N, R. 26 East;

(f) Sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 all in Tp. 19 N, R. 26 East;

(g) All of the odd numbered sections and parts of sections lying south and east of the thread of the stream of the Rio Puerco of the West and South of the right of way of the Atlantic and Pacific Railroad, in Tp. 20, R. 26 East, to-wit: Sections 23, 25, 27, 31, 33, and 35, Tp. 20 N, R. 26 East;

(h) The west one-half of Section 26, Tp. 20 N.

(i) The west one-half of the SW $\frac{1}{4}$ and south

one-half of the NW $\frac{1}{4}$ of Section 12, Tp. 19 N. R. 25 East;

(j) The SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 34, Tp. 18 N, R. 26 East;

(k) That fractional part of the N $\frac{1}{2}$ of the NE $\frac{1}{4}$; the SE $\frac{1}{4}$ of the NE $\frac{1}{4}$ and the NE $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 28, Tp. 20 N, R. 26 East of the G. & S. R. M. lying south and east of the Atchison and Topeka and Santa Fe Railroad Company's right of way, containing 40 acres, more or less;

(l) Also all appurtenances thereto and improvements thereon, together with all rights to the use of water and easements for the carriage of water for use in irrigating said lands and premises, and also all shares of stock and shares of water and water rights, in any ditch or irrigation company or water users' association which may in any manner now or hereafter entitle the owner of said premises to water for irrigating same.

Wherein it was decreed that said property be sold as under execution in satisfaction of said Judgment.

Therefore, you are hereby commanded to seize the above described property and sell the same as under execution, and that you apply the proceeds thereof to the payment and satisfaction of said Judgment, together with Plaintiff's costs of suit, together with accruing costs; and if said property shall sell for more than sufficient to pay off and satisfy said sum of money, then you are hereby directed to pay over the excess thereof to the Defendant, the Apache Land and Cattle Company.

Herein Fail Not, under the penalty of the law, but due return make hereof, showing how you have executed the same, within 30 days after receipt hereof, with what you have [27] done endorsed thereon.

Witness, Honorable Levi S. Udal, Judge of said Superior Court of Apache County, State of Arizona, at the Court House in said County of Apache, State of Arizona, this 28th day of August, 1940.

Attest my hand and the seal of said Court, the day and year last above written.

MYRLAN G. BROWN,

Clerk of the Superior Court
of Apache County, Arizona.

By
Deputy Clerk. [28]

50050

4.

In the Superior Court
Of Apache County, State of Arizona
State of Arizona,
County of Apache—ss.

CLERK'S CERTIFICATE OF COURT
RECORD

I, Myrlan G. Brown, Clerk of the Superior Court of the State of Arizona, in and for the County of Apache, do hereby certify that the attached and foregoing is a true and correct Copy of the Original

Sheriff's Return of Execution and Order of Sale Real Property, Civil No. 2065 as the same appears of record in my office, and of the whole thereof.

In Witness Whereof, I have hereunto set my hand and the official seal of this Court this 25 day of Sept. 1941.

[Seal]

MYRLAN G. BROWN

Clerk of said Superior Court

[Endorsed]: Filed. Walter S. Wilson, Clerk.
By Ernest R. Morris, Deputy. Dec. 30, 1944. [29]

In the Superior Court of the State of Arizona,
In and For the County of Apache

No. 2065

THE FRANKLIN LIFE INSURANCE COM-
PANY, a corporation,

Plaintiff,

vs.

THE APACHE LAND AND CATTLE COM-
PANY, a corporation,

Defendant.

SHERIFF'S RETURN OF EXECUTION AND
ORDER OF SALE OF REAL PROPERTY

State of Arizona,

County of Apache—ss.

I, John Nunn, Sheriff of the County of Apache,
State of Arizona, do hereby certify:

That under and by virtue and in pursuance of the annexed Writ of Execution and Order of Sale, I noticed for sale all of the property therein described and more particularly hereinafter described, in satisfaction of said Judgment as required by law and the mandate of said writ:

(a) Sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, and 23, all in Township 17 North, Range 25 East;

(b) Sections 1, 3, 5, 9, 11, 13, 15, 17, 21, 23, 25, 27, 29, 33, and 35, all in Twp. 18 N. R. 25 East;

(c) All of odd numbered sections and parts of odd numbered sections lying south and east of the thread of the stream of the Rio Puerco of the West and South of the Southern limit of the right of way of the Atlantic and Pacific Railroad, to-wit: Sections 1, 11, 13, 15, 21, 23, 25, 27, 33, and 35, all in Twp. 19 N. R. 25 East;

(d) Sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, and 23, all in Twp. 17 N., R. 26 East;

(e) Sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 all in Twp. 19 N. R. 26 East;

(f) Sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, and 35 all in Twp. 19 N. R. 26 East;

(g) All of the odd numbered sections and parts of sections lying south and east of the thread of the stream of the Rio Puerco of the West and South of the right of way of the [30] Atlantic and Pacific Railroad, in Twp. 20, R. 26 East, to wit: Sections 23, 25, 27, 31, 33, and 35, Twp. 20 N. R. 26 East;

(h) The west one-half of Sections 26, Twp. 20 N. R. 26 East;

(i) The west one-half of the SW $\frac{1}{4}$ and south one-half of the NW $\frac{1}{4}$ of Section 12, Twp. 19 N., R. 25 East;

(j) The SW $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 34, 18 N., R. 26 East;

(k) That fractional part of the N $\frac{1}{2}$ of the NE $\frac{1}{4}$; the SE $\frac{1}{4}$ of the NE $\frac{1}{4}$ and the NE $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 28; Twp. 20 N. R. 26 East of the G. & S. R. M. lying South and East of the Atchison and Topeka and Santa Fe Railroad Company's right of way, containing 40 acres, more or less;

(l) Also all appurtenances thereto and improvements thereon, together with all rights to the use of water and easements for the carriage of water for use in irrigating said lands and premises, and also all shares of stock and shares of water and water rights, in any ditch or irrigation company or water users' association which may in any manner now or hereafter entitled the owner of said premises to water for irrigating same.

That in pursuance to said execution and order of sale, I caused to be published a notice of sale of the above described property once each week for four successive weeks next before said sale in the Apache County Independent-News, a weekly publication of general circulation, published in said County of Apache, State of Arizona, and posted notices of said sale in three public places in said County for four successive weeks next before said sale. One of said

notices being posted at the door of the County Court House of said County and State.

That on the 7th day of October, 1940 at the hour of 3:30 o'clock p.m. at the door of the Court House of said County, in St. Johns, Apache County, Arizona, the property mentioned, set forth and fully described in said Execution and Order of Sale was duly offered for sale at public auction in satisfaction of said Judgment, pursuant to said notice and said writ. And at said sale of all of the said property so described therein, said premises were duly struck off by me and sold to the Franklin Life Insurance Company for the Total sum of One Hundred and Fifty Thousand Dollars (\$150,000.00), said corporation being the highest [31] bidder and said amount being the highest sum bid. Said sum so bid and received being bid in satisfaction of said Judgment and costs in said cause, this execution and order of sale is now returned fully satisfied.

That I have made and delivered to the said purchaser the legal certificate of sale, and have filed for record with the County Recorder of said Apache County, Arizona, a true copy of or duplicate of said certificate.

That receipt of Plaintiff's attorney in full satisfaction of said Judgment is attached hereto and made a part of this return.

Dated this 7th day of October, A. D. 1940.

/s/ JOHN NUNN

Sheriff

State of Arizona,
County of Apache—ss.

This receipt is to acknowledge to John Nunn, Sheriff of Apache County, Arizona, satisfaction in full of the Judgment and costs in the foregoing Execution and Order of Sale, said sum being the amount bid for the property this day sold at Sheriff's sale in full satisfaction of said Judgment, and said sum so bid being evidenced and represented by the Certificate of Sale issued to the purchaser of said property, who is also the Judgment creditor.

Dated this 7th day of October, 1940.

/s/ HENRY H. CLARK

EARL PLATT

Attorneys for Plaintiff [32]

50050

5.

SHERIFF'S DEED

FROM

JOHN NUNN, Sheriff of the County of Apache,

To

THE FRANKLIN LIFE INSURANCE
COMPANY

Dated, April 12, 1941.

SHERIFF'S DEED

This Indenture, Made the 12th day of April, A.D. 1941, between John Nunn, Sheriff of the County

of Apache, State of Arizona, the party of the first part, and The Franklin Life Insurance Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, the party of the second part,

Witnesseth, Whereas, in and by a certain judgment and Decree, made and entered by the Superior Court of Apache County, State of Arizona, on or about the 17th day of August, 1940, in a certain action then pending in said Court, wherein said The Franklin Life Insurance Company was plaintiff, and The Apache Land and Cattle Company, a corporation organized and existing under and by virtue of the laws of the State of Colorado, was defendant, it was, among other things, ordered, adjudged and decreed that all and singular the mortgaged premises described in the complaint in said action, and specifically described in said judgment and decree should be sold at public auction by the Sheriff of the said County of Apache in the manner required by law.

And Whereas, in accordance with said judgment and decree, an order of sale was, on or about the 28th day of August, 1940, issued and delivered to the said Sheriff commanding him to [33] seize the premises described in said judgment and decree and sell the same as under execution, and apply the proceeds of said sale toward the satisfaction of said judgment, and make return thereof within thirty days; and, whereas, pursuant to said order of sale to him directed and delivered, the said Sheriff duly levied on the premises mentioned in said judgment

and decree and hereinafter described and, agreeably to said judgment and decree and the provisions of law, did, at the hour of 3:30 o'clock P.M., on the 7th day of October, 1940, after due public notice had been given as required by the laws of this State and the course and practice of said Court, sell said premises at public auction at the door of the Court House in the city of St. Johns, in said county of Apache; at which sale the said premises mentioned in said judgment and decree, and hereafter described, were fairly struck off to the highest bidder therefor, to-wit, the said The Franklin Life Insurance Company, the said party of the second part, for the sum of One hundred and fifty thousand Dollars, (\$150,000.00), that being the highest sum bid for the same.

And Whereas, the said party of the second part thereupon directed the said Sheriff to accept said bid in full satisfaction of the judgment for \$225,000.00, and costs, theretofore entered in favor of the plaintiff in the above entitled action, the party of the second part herein, and to make his return of execution accordingly.

And Whereas, the said Sheriff thereupon made and issued the usual certificate in the duplicate of the said sale in due form of law, and delivered one thereof to the said purchaser and caused the other to be filed in the office of the County Recorder of said Apache County, and thereafter made, and filed in the Superior Court of said County, in the above entitled [34] action, his return of execution wherein

he recited that said bid was accepted as aforesaid in full satisfaction of said judgment.

And Whereas, more than six months have elapsed since the date of said sale, and no redemption has been made of the premises so sold as aforesaid, by or on behalf of the said judgment debtor, said The Apache Land and Cattle Company, or by or on behalf of any other person. And no notice of intention to redeem having been given by any lien holder, creditor or other person entitled to redeem, as provided by law.

Now, This Indenture Witnesseth: That the said party of the first part, the said Sheriff, in order to carry into effect the sale so made by him as aforesaid, in pursuance of said judgment and decree and in conformity to the Statute in such case made and provided, and also in consideration of the premises and of the said sum of \$150,000.00 so bid as aforesaid by the said purchaser, the said party of the second part herein, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey, unto the said party of the second part, and to its successors and assigns forever, all those certain lots, pieces, or parcels of land situate, lying and being in the said County of Apache, State of Arizona, bounded and particularly described as follows, to-wit:

(a) Sections One (1), Three (3), Five (5), Seven (7), Nine (9), Eleven (11), Thirteen (13), Fifteen (15), Seventeen (17), Nineteen (19), Twenty-one (21), and Twenty-three (23), all in Township Seventeen (17), North, Range Twenty-five (25) East;

(b) Sections One (1), Three (3), Five (5), Nine (9), Eleven (11), Thirteen (13), Fifteen (15), Seventeen (17), Twenty-one (21), Twenty-three (23), Twenty-five (25), Twenty-seven (27), Twenty-nine (29), Thirty-three (33), and Thirty-five (35), all in Township Eighteen (18) North, Range Twenty-five (25) East;

(c) All of odd numbered sections and parts of odd numbered sections lying south and east of the thread of the stream of the Rio Puereo of the West and South [35] of the Southern limit of the right of way of the Atlantic and Pacific Railroad, to-wit: Sections One (1), Eleven (11), Thirteen (13), Fifteen (15), Twenty-one (21), Twenty-three (23), Twenty-five (25), Twenty-seven (27), Thirty-three (33), and Thirty-five (35), all in Township Nineteen (19) North, Range Twenty-five (25) East;

(d) Sections One (1), Three (3), Five (5), Seven (7), Nine (9), Eleven (11), Thirteen (13), Fifteen (15), Seventeen (17), Nineteen (19), Twenty-one (21) and Twenty-three (23), all in Township Seventeen (17), North, Range Twenty-six (26), East;

(e) Sections One (1), Three (3), Five (5), Seven (7), Nine (9), Eleven (11), Thirteen (13), Fifteen (15), Seventeen (17), Nineteen (19), Twenty-one (21), Twenty-three (23), Twenty-five (25), Twenty-seven (27), Twenty-nine (29), Thirty-one (31), Thirty-three (33), and Thirty-five (35), all in Township Eighteen (18) North, Range Twenty-six (26) East;

(f) Sections One (1), Three (3), Five (5), Seven (7), Nine (9), Eleven (11), Thirteen (13), Fifteen

(15), Seventeen (17), Nineteen (19), Twenty-one (21), Twenty-three (23), Twenty-five (25), Twenty-seven (27), Twenty-nine (29), Thirty-one (31), Thirty-three (33), and Thirty-five (35), all in Township Nineteen (19) North, Range Twenty-six (26) East;

(g) All of the odd numbered sections and parts of sections lying south and east of the thread of the stream of the Rio Puerco of the West and South of the right of way of the Atlantic and Pacific Railroad, in Township Twenty (20) North, Range Twenty-six (26) East, to-wit: Sections Twenty-three (23), Twenty-five (25), Twenty-seven (27), Thirty-one (31), Thirty-three (33), and Thirty-five (35), Township Twenty (20) North, Range Twenty-six (26) East;

(h) The West One-half of Section Twenty-six (26), Township Twenty (20), North, Range Twenty-six (26) East;

(i) The West One-half of the Southwest quarter and South One-half of the Northwest Quarter of Section Twelve (12), Township Nineteen (19), North, Range Twenty-five (25) East;

(j) The Southwest Quarter of Northwest Quarter of Section Thirty-four (34), Township Eighteen (18) North, Range Twenty-six (26) East;

(k) That fractional part of the North half of the Northeast Quarter; the southeast quarter of the northeast quarter and the northeast quarter of the northwest quarter of Section Twenty-eight (28), Township Twenty (20) North, Range Twenty-six

(26) East of the G. & S. R. M., lying south and east of the Atchison and Topeka and Santa Fe Railroad Company's right of way, and containing 40 acres, more or less; [36]

(1) Also all appurtenances thereto and improvements thereon, together with all rights to the use of water and easements for the carriage of water for use in irrigating said lands and premises, and also all shares of stock and shares of water and water rights, in any ditch or irrigation company or water users' association which may in any manner now or hereafter entitle the owner of said premises to water for irrigating same.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the revision and revisions, remainder and remainders, rents, issues and profits thereof.

To Have and to Hold all and singular the said premises hereby conveyed, or intended so to be, together with the appurtenances, unto the said party of the second part, its successors and assigns forever.

In Witness Whereof, the said party of the first part of these presents has hereunto set his hand and seal, the day and year first above written.

[Seal]

JOHN NUNN

Sheriff of Apache County,
Arizona.

Signed, Sealed and Delivered in the presence of
EMILIO GARCIA.

State of Arizona

County of Apache—ss.

On the 12th day of April, 1941, personally appeared the above named John Nunn, Sheriff of the County of Apache, State of Arizona, known to me to be the person described in and whose name is subscribed to the above and foregoing instrument, and he, the said John Nunn, acknowledged to me that he, as such Sheriff, executed the same for the uses, purposes and considerations therein expressed.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal at my office in the County of Apache, [37] State of Arizona, the day and year in this Certificate first above written.

EARL PLATT

Notary Public.

My Commission expires March 14, 1943.

State of Arizona

County of Maricopa—ss.

Richard Fennemore, being first duly sworn, upon his oath deposes and says:

That he is one of the attorneys for The Franklin Life Insurance Company and as such attorney has examined the Sheriff's Deed from John Nunn, Sheriff of the County of Apache, to The Franklin Life Insurance Company, dated April 12, 1941;

That the attached copy is a true and correct copy of the original deed.

RICHARD FENNEMORE

Subscribed and sworn to before me this 27th day
of October, 1943.

[Seal] LUETTA C. BRADFORD

Notary Public

My Commission Expires: Aug. 12, 1945.

Filed and recorded at the request of Earl Platt,
April 12th, 1941 at 3 P.M. in Book of Deeds No. 26,
at page 266, Records of Apache County, Arizona.

[Seal] JOYCE U. COLTER

County Recorder

[Endorsed]: Filed Jan. 10, 1942. Walter S.
Wilson, Clerk. By L. H. Buck, Deputy. [38]

In the United States District Court
For the District of Arizona.

October 1943 Term At Phoenix

Wednesday, January 26, 1944
(Minutes Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, Presiding.

Civ-67-Prescott.

[Title of Cause.]

It Is Ordered that the motion of the defendant
The Franklin Life Insurance Company, a corpora-
tion, for summary judgment be and it is granted.

[39]

In the District Court of the United States
For the District of Arizona

No. Civ. 67 Prct.

THE APACHE LAND AND CATTLE COM-
PANY, a corporation,

Plaintiff,

vs.

THE FRANKLIN LIFE INSURANCE COM-
PANY, a corporation; JOHN DOE, JANE
DOE and DOE-ROE COMPANY, a corpora-
tion; and all the Heirs, Unknown Heirs, Ex-
ecutors, Administrators, Successors-in-Interest
or assigns of any of the Above Named Parties,
Defendants.

SUMMARY JUDGMENT

This cause came on to be heard upon motion of The Franklin Life Insurance Company, a corporation, for Summary Judgment, and was submitted upon said motion, the pleadings on file, and the documents presented with said motion, and therefore, upon consideration thereof, It Is Ordered, Adjudged and Decreed that plaintiff The Apache Land and Cattle Company, a corporation, has no right, title or interest in or to the following described lands situate in Apache County, Arizona, all townships and ranges being based upon the Gila & Salt River Base and Meridian, to wit:

Sections One (1), Three (3), Five (5), Seven (7), Nine (9), Eleven (11), Thirteen (13), Fifteen (15), Seventeen (17), Nineteen (19), Twenty-one (21), and Twenty-three (23), all in Township Seventeen (17) North, Range Twenty-five (25) East;

Sections One (1), Three (3), Five (5), Nine (9), Eleven (11), Thirteen (13), Fifteen (15), Seventeen (17), Twenty-one (21), Twenty-three (23), Twenty-five (25), Twenty-seven (27), Twenty-nine (29), Thirty-three (33), and Thirty-five (35), all in Township Eighteen (18) North, Range Twenty-five (25) East; [40]

All of odd numbered sections and parts of odd numbered sections lying south and east of the thread of the stream of the Rio Puerco of the West and South of the Southern limit of the right of way of the Atlantic & Pacific Railroad, to-wit:

Sections One (1), Eleven (11), Thirteen (13), Fifteen (15), Twenty-one (21), Twenty-three (23), Twenty-five (25), Twenty-seven (27), Thirty-three (33), and Thirty-five, all in Township Nineteen (19) North, Range Twenty-five (25) East;

Sections One (1), Three (3), Five (5), Seven (7), Nine (9), Eleven (11), Thirteen (13), Fifteen (15), Seventeen (17), Nineteen (19), Twenty-one (21), and Twenty-three (23), all in Township Seventeen (17) North, Range Twenty-six (26) East;

Sections One (1), Three (3), Five (5), Seven (7), Nine (9), Eleven (11), Thirteen (13), Fifteen (15), Seventeen (17), Nineteen (19), Twenty-one (21), Twenty-three (23), Twenty-five (25), Twenty-

seven (27), Twenty-nine (29), Thirty-one (31), Thirty-three (33), and Thirty-five (35); all in Township Eighteen (18) North, Range Twenty-six (26) East;

Sections One (1), Three (3), Five (5), Seven (7), Nine (9), Eleven (11), Thirteen (13), Fifteen (15), Seventeen (17), Nineteen (19), Twenty-one (21), Twenty-three (23), Twenty-five (25), Twenty-seven (7), Twenty-nine (29), Thirty-one (31), Thirty-three (33), and Thirty-five (35), all in Township Nineteen (19) North, Range Twenty-six (26) East;

All of the odd numbered sections and parts of sections lying south and east of the thread of the stream of the Rio Puerco of the west and south of the right of way of the Atlantic and Pacific Railroad, in Township Twenty (20), Range Twenty-six (26) East, to-wit:

Sections Twenty-three (23), Twenty-five (25), Twenty-seven (27), Thirty-one (31), Thirty-three (33), and Thirty-five (35), in Township Twenty (20) North, Range Twenty-six (26) East;

The West One-half of Section Twenty-six (26), Township Twenty (20) North, Range Twenty-six (26) East, 320 acres, (This land is known as the land purchased from Ferdinand V. Barber and Mary A. Barber, and known as the Barber Homestead);

The West one-half of the Southwest Quarter and South one-half of the Northwest Quarter of Section Twelve (12), Township Nineteen (19) North, Range Twenty-five (25) East, 160 acres. (This

land is known as the Loy C. Turbeville homestead);

The Southwest Quarter of the Northwest Quarter of Section Thirty-four (34), Township Eighteen (18) North, Range Twenty-six (26) East, 40 acres. (This land is known as the James E. Porter Railroad Land Strip.) [41]

That fractional part of the North half of the Northeast Quarter; the Southeast Quarter of the Northeast Quarter and the Northeast Quarter of the Northwest Quarter of Section Twenty-eight (28), Township Twenty (20) North, Range Twenty-six (26) East, lying South and East of the Atchison, Topeka and Santa Fe Railroad Company's right of way (and containing 40 acres, more or less);

Together with all appurtenances thereto and improvements thereon, and with all rights to the use of water and easements for the carriage of water for use in irrigating said premises;

and that defendant recover its costs herein incurred, hereby taxed at \$40.00.

Form Approved:

GUY AXLINE 2/3/44

ARMSTRONG, KRAMER, MOR-
RISON & ROCHE

GUY AXLINE

By ARMSTRONG, KRAMER, MOR-
RISON & ROCHE

Attorneys for Plaintiff

[Endorsed]: Defendant's Proposed Form of Summary Judgment. Filed Feb. 3, 1944. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Gertrude I. Bitting, Deputy Clerk.

[Endorsed]: Deft's Judgment. Filed Feb. 8, 1944. Edward W. Scruggs, Clerk, United States District Court for the District of Arizona. By Gertrude I. Bitting, Deputy Clerk. [42]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that The Apache Land and Cattle Company, plaintiff in the foregoing entitled action, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit,

from the final judgment entered in this action on February 8, 1944.

KRAMER, MORRISON, ROCHE
& PERRY

J. E. MORRISON

309 1st Nat'l Bank Bldg.,

Phoenix, Ariz.

Attorneys for Plaintiff

Received copy of the within document this 3rd day of April, 1944.

FENNEMORE, CRAIG, ALLEN
& BLEDSOE

Attorney for Defendants

[Endorsed]: Filed Apr. 3, 1944. [43]

[Title of District Court and Cause.]

DEPOSIT OF CASH BOND

Comes now The Apache Land and Cattle Company, a corporation, plaintiff herein, and deposits with the Clerk of this Court the sum of Two Hundred Fifty Dollars (\$250.00) as a cash bond on this appeal.

KRAMER, MORRISON, ROCHE
& PERRY

J. E. MORRISON

309 First National Bk. Bldg.,

Phoenix, Arizona

Attorneys for Plaintiff

Received copy of the within document this 3rd day of April, 1944.

FENNEMORE, CRAIG, ALLEN
& BLEDSOE

Attorney for Defendants

[Endorsed]: Filed Apr. 3, 1944. [44]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To Edward W. Scruggs, Clerk of the United States
District Court for the District of Arizona:

The portions of the record and proceedings to be contained in the record on appeal in this case are hereby designated as follows:

(1) Complaint

(2) Answer

(3) Reply

(4) Motion for Summary Judgment

(5) Order Sustaining Motion for Summary
Judgment

(6) Judgment

(7) This Designation

(8) Certified copies of the following, all in the case of The Franklin Life Insurance Company, plaintiff, vs. The Apache Land and

Cattle Company, No. 2065, Apache County,
Arizona:

- (a) Sheriff's Certificate of Sale of Real
Estate
- (b) Execution and Order of Sale
- (c) Sheriff's Return Execution and Order
of Sale

(9) Notice of Appeal

(10) Plaintiff's deposit of Cash Bond.

KRAMER, MORRISON, ROCHE
& PERRY

J. E. MORRISON

309 First Natl. Bk. Bldg.,
Phoenix, Ariz.

Attorneys for Plaintiff [45]

Received copy of the within document this 10th
day of April, 1944.

FENNEMORE, CRAIG, ALLEN
& BLEDSOE

By EARLY CRAIG

Attorney for Defendants

[Endorsed]: Filed Apr. 10, 1944. [46]

[Title of District Court and Cause.]

DEFENDANT'S DESIGNATION OF ADDI-
TIONAL CONTENTS OF RECORD ON
APPEAL

To Edward W. Scruggs, Clerk of the United States
District Court for the District of Arizona:

The Franklin Life Insurance Company, a cor-
poration, one of the defendants above-named hereby

designates the following additional portions of the record and proceedings to be contained in the record on appeal in this case:

- (1) Certified copy of Judgment and Decree
- (2) Verified copy of Sheriff's Deed

both of said documents being in that certain action in the Superior Court of Apache County, State of Arizona, numbered therein 2065, in which The Franklin Life Insurance Company, a corporation, was plaintiff and The Apache Land and Cattle Company, a corporation, was defendant, and both of said documents being exhibits to defendant's Motion for Summary Judgment heretofore filed in the above entitled matter.

- (3) This Designation.

FENNEMORE, CRAIG, ALLEN
& BLEDSOE

By RICHARD FENNEMORE

Attorneys for Defendant The
Franklin Life Insurance
Company [47]

Received copy of the foregoing Designation this
19th day of April, 1944.

KRAMER, MORRISON, ROCHE
& PERRY

By J. E. MORRISON

Attorneys for Plaintiff

[Endorsed]: Filed Apr. 19, 1944. [48]

In the United States District Court for the
District of Arizona

United States of America,
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of said court, including the records, papers and files in the case of The Apache Land and Cattle Company, a corporation, plaintiff, versus The Franklin Life Insurance Company, a corporation; John Doe, Jane Doe and Doe-Roe Company, a corporation; and all the Heirs, Unknown Heirs, Executors, Administrators, Successors-in-Interest or assigns of any of the Above Named Parties, defendants, numbered Civ-67 Prescott, on the docket of said court.

I further certify that the attached pages, numbered 1 to 49, inclusive, contain a full, true and correct transcript of all the proceedings had in said cause and of all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the Plaintiff's Designation of Contents of Record on Appeal, and Defendant's Designation of Additional Contents of Record on Appeal, filed therein and made a part of the transcript attached hereto, as the same appear from the originals of record remaining on file in my office as such clerk in the City of Phoenix, State and District aforesaid.

I further certify that the Clerk's fees for preparing and certifying this said transcript of record

amounts to the sum of \$15.95 and that sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said court at Phoenix, Arizona, this 4 day of May, 1944.

[Seal] EDWARD W. SCRUGGS,

Clerk

By CATHERINE A. DOUGHERTY

Deputy Clerk [49]

[Endorsed]: No. 10764. United States Circuit Court of Appeals for the Ninth Circuit. The Apache Land and Cattle Company, a corporation, Appellant, vs. The Franklin Life Insurance Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed May 8, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10764

THE APACHE LAND AND CATTLE COM-
PANY, a corporation,

Appellant,

vs.

THE FRANKLIN LIFE INSURANCE COM-
PANY, a corporation, et al,

Appellees.

APPELLANT'S STATEMENT OF POINTS

Notwithstanding the fact that the appellant herein did not plead the lack of qualification of appellee The Franklin Life Insurance Company under the laws of the State of Arizona in case No. 2065 in the Superior Court of the State of Arizona in and for the County of Apache, it has the right to plead the same in this cause, and the judgment in the said Apache County case is not *res judicata* of this action for the following reasons:

(1) That the lack of qualification is a matter of public policy of the state.

(2) That neither the appellant nor anyone else can waive the same.

(3) That it is one of the matters that can be raised at any time in any action.

(4) That it is the duty of any court upon facts coming to its attention showing such disqualifica-

tion, to immediately declare any and all acts of such foreign corporation wholly void.

KRAMER, MORRISON, ROCHE
& PERRY

J. E. MORRISON

First Natl. Bank Bldg.,

Phoenix, Arizona

GUY AXLINE

Holbrook, Arizona

Attorneys for Appellant

We hereby designate the entire transcript for printing.

KRAMER, MORRISON, ROCHE
& PERRY

J. E. MORRISON

First Natl. Bank Bldg.,

Phoenix, Arizona

J. E. MORRISON

Holbrook, Arizona

Attorneys for Appellant

Received copy of the within document this 15th day of May, 1944.

FENNEMORE, CRAIG, ALLEN
& BLEDSOE

Attorneys for Appellee

[Endorsed]: Filed May 16, 1944. Paul P. O'Brien, Clerk.

No. 10764

**United States
Circuit Court of Appeals
For the Ninth Circuit 6**

THE APACHE LAND AND CATTLE COMPANY,
a corporation,

Appellant,

vs.

THE FRANKLIN LIFE INSURANCE COMPANY,
a corporation, et al,

Appellees.

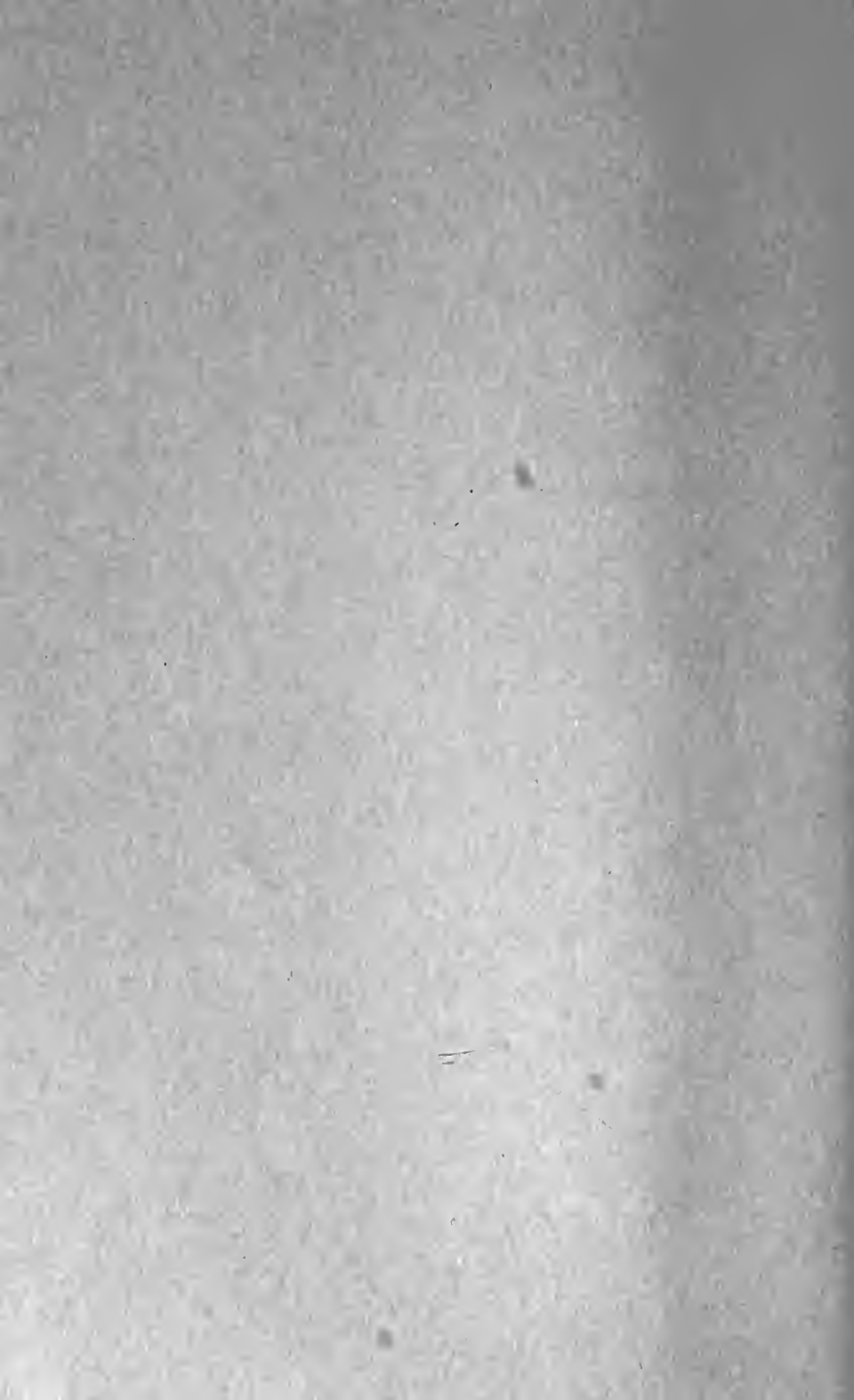
Appellant's Opening Brief

Upon Appeal from the District Court of the United States
for the District of Arizona.

FILED

JUL - 6 1944

PAUL P. O'BRIEN
CLERK



No. 10764

**United States
Circuit Court of Appeals
for the Ninth Circuit**

THE APACHE LAND AND CATTLE COMPANY,
a corporation,

Appellant,

vs.

THE FRANKLIN LIFE INSURANCE COMPANY,
a corporation, et al,

Appellees.

Appellant's Opening Brief

Upon Appeal from the District Court of the United States
for the District of Arizona.



I N D E X

	Page
Argument	6
Discussion of Point 1.....	7
Discussion of Points 2, 3, 4 and 5.....	9
Specification of Errors	5
Statement of the Case.....	3
Statement of Pleadings and Facts Disclosing Jurisdiction	2

INDEX TO CASES CITED

Arizona Code Annotated, 1939, 53-801.....	9
Arizona Code Annotated, 1939, 53-802.....	10
34 C. J. 859.....	8
Louisville & N. R. Co. v. Railroad Commission of Alabama, 205 Fed. 800 (Syl. 2).....	8
National Union Indemnity Co. v. Bruce Bros. Inc., 44 Ariz. 455, 463; 38 P. (2) 648.....	10
Scott v. Bruce Bros. Inc., 44 Ariz. 469; 38 P. (2) 654.....	14
Sec. 27 U. S. Judicial Code, Title 28 U. S. C. A. Sec. 41	3
Sec. 128 U. S. Judicial Code, Title 28 U. S. C. A. Sec. 225	3
9 Words & Phrases, Third Series, 875.....	11



ATTORNEYS OF RECORD

ARMSTRONG, KRAMER, MORRISON &
ROCHE

First National Bank Building,
Phoenix, Arizona.

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Holbrook, Arizona.
Attorneys for Appellant.

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Phoenix National Bank Bldg.
Phoenix, Arizona.

Attorneys for Appellee,
The Franklin Life Insurance Company.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10764

THE APACHE LAND AND CATTLE COMPANY,
a corporation,

Appellant,

vs.

THE FRANKLIN LIFE INSURANCE COMPANY,
a corporation, et al.

Appellees.

Appellant's Opening Brief

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

The Apache Land and Cattle Company, plaintiff below, hereinafter referred to as 'Apache', is a corporation organized under the laws of the State of Colorado; The Franklin Life Insurance Company, defendant below, hereinafter referred to as 'Franklin', is a corporation organized under the laws of the State of Illinois; the value of the property involved is largely in excess of \$3,000 and a separable controversy exists between Apache and Franklin (Apache's complaint, T. R. 2; Franklin's answer T. R. 8). The action between citizens of different states, was removed from the Superior Court of Apache County, Arizona, to the United States District Court for the District of Arizona, which has

jurisdiction under the provisions of Section 27, U. S. Judicial Code, Title 28, U. S. C. A. Section 41, p. 32. Judgment adverse to Apache was rendered by the United States District Court for the District of Arizona (T. R. 46), and this Court has jurisdiction upon this appeal to review the said judgment under the provisions of Section 128, Judicial Code, Title 28, U. S. C. A. Section 225, p. 294.

STATEMENT OF THE CASE

On August 19, 1942, Apache filed in the Superior Court of Apache County, Arizona, its complaint to quiet title to certain lands located in Apache County, Arizona. (T. R. 2-7). Franklin caused said case to be removed to United States District Court because of diversity of citizenship, value of property was more than \$3,000, and a separable controversy.

The complaint alleges that the Apache Land and Cattle Company is the owner in fee simple of certain described lands in Apache County, Arizona, and that the Franklin Life Insurance Company makes some claims adverse to the Apache in the said lands; that said claims of Franklin are without right; that Franklin has no right, title, claim or interest in said property, and prays that Franklin be required to set forth the nature of its claims; that it be adjudged and decreed that Apache is the owner of the said property in fee simple, and that Franklin be barred and estopped from having any claim adverse to Apache (T. R. 2).

The Franklin removed the case to the United States District Court of Arizona and filed its answer (T. R. 8), alleging that it is the owner in fee simple of all of said land by reason of proceedings in a certain foreclosure action wherein Franklin was plaintiff and Apache was defendant, No. 2065, Superior Court of Apache County, Arizona, commenced on or about the 19th day of February, 1938, and whereby Franklin on the 12th day of April, 1941, recovered a sheriff's deed to all of said property.

On July 6, 1943, Apache filed its reply (T. R. 12) in which it alleged that at all of the times and dates referred to in Franklin's answer, Franklin had failed to qualify to do business in Arizona, and that it was at all of said times engaged in an enterprise of permanence and durability in Arizona, did transact a substantial part of its business in Arizona, and that each and all of said acts of Franklin were wholly void. Thereafter, on October 27, 1943, Franklin served and filed its motion for summary judgment (T. R. 14), based upon the pleadings and certified copies of certain written documents in the foreclosure case between Franklin and Apache (T. R. 15-44), and referred to in said motion, alleging that there was no genuine issue of fact. Franklin contends that it is the owner of the land by reason of a sheriff's deed (T. R. 37), dated April 12, 1941, in said foreclosure suit in Apache County. It is not disputed that the said foreclosure suit was so commenced and that the said sheriff's deed was so issued conveying the same land described

in Apache's complaint in the case at bar. In its reply (T. R. 12) Apache alleges that, at all of the times when the notes and mortgages (T. R. 9), upon which the foreclosure case is based, and prior thereto, the Franklin was a foreign corporation organized under the laws of Illinois, and had wholly failed to qualify to do business in Arizona, and therefore all of said indebtedness, notes, mortgage and all of the said foreclosure proceedings and the sheriff's deed are void (53-801, 802 ACA 1939, hereinafter set forth in full). The Franklin contends that, as Apache did not plead said lack of qualification in the foreclosure suit, the question is *res judicata*. Apache contends that such lack of qualification is not *res judicata* but can lawfully be pleaded in the case at bar.

The District Court granted Franklin's motion for summary judgment (T. R. 45) and entered judgment (T. R. 46) that Apache had no right, title or interest in said property.

Apache gave notice of appeal to this Court (T. R. 50), filed its cash appeal bond (T. R. 51), and thus this case comes before this Court on appeal.

(The word 'complaint' appearing in the 5th line on page 13, Transcript of Record, is a typographical error and should be 'answer'.)

SPECIFICATION OF ERRORS

I.

The District Court erred in granting Franklin's motion for summary judgment for the reason that the issue

of Franklin's failure to qualify was not and could not be res adjudicata.

II.

The District Court erred in rendering summary judgment for the reason that the issue of Franklin's failure to qualify was not and could not be res judicata.

III.

The District Court erred in granting the motion for summary judgment and rendering judgment against Apache for the reason that when a general judgment is rendered which specifically expresses the issues determined and upon which relief is granted, only such issues are res judicata; the judgment in the foreclosure case is general and does not expressly find as to Franklin's lack of qualification.

ARGUMENT

There is but one point before this court on this appeal and that is whether the question of the lack of qualification by Franklin is now res judicata in this action because Apache did not plead it in the foreclosure proceedings. In its reply in the case at bar Apache pleaded such lack of qualification and the lower court held that such plea was not open to Apache; that the question was res judicata because it should have been pleaded in the foreclosure action.

Our position is that we have the right to now plead the lack of qualification in the case at bar for the following reasons:

(1) That the judgment in the foreclosure case is general and where a judgment is general, but specifically expresses the issues determined upon which relief is granted, only such issues are *res judicata*; the judgment in the foreclosure case makes no specific findings as to Franklin's lack of qualification;

(2) That it is a matter of public policy of the State;

(3) That neither the plaintiff nor anyone else can waive the same;

(4) That it is one of the matters which can be raised at any time in any action;

(5) That it is the duty of any court in Arizona upon facts coming to its attention, showing such disqualification, to immediately declare any and all acts of such foreign corporation wholly void.

DISCUSSION OF POINT 1

As there is but one point at issue, the argument applies to all of the specification of errors, and we will here discuss the first reason, hereinafter immediately given, to sustain our position.

That the judgment in the foreclosure case is general and where a judgment is general, but specifically expresses the issues determined upon which relief is granted, only such issues are *res judicata*; the judgment in the foreclosure case makes no specific findings as to Franklin's lack of qualification.

The judgment in the foreclosure case is not a bar as it is general, specifically expresses the issues determined,

and makes no findings with reference to Franklin's lack of qualification; therefore, that issue is not *res judicata*.

"The general rule is not applicable when the judgment specifically expresses the issues determined and upon which relief is granted; in such case only the issues so specified are *res judicata*."

34 C. J. 859 (Par. exceptions to rule)

"The recognized principle that, where a general judgment is rendered, all matters that might have been interposed as a defense are considered as adjudicated between the parties, is not applicable when a decree specifically expresses the issues determined and upon which the relief is granted, in which case only such issues are *res judicata*."

*Louisville & N. R. Co. v. Railroad
Commission of Alabama,*
205 Fed. 800 (Syl. 2)

In the foreclosure case the court in its judgment and decree specifically expressed the issues which were determined and upon which relief was granted. The defense that the defendant was not qualified is not mentioned. Therefore, the question is not barred by the said judgment in the foreclosure proceedings. The findings of the lower court are contained in the first paragraph of the judgment on page 19 T. R., and are "(1) that all of the allegations and averments contained in the complaint and in the supplemental complaint are true; (2) that the defendant is indebted to plaintiff in the total agreed sum as aforesaid of \$225,000.00, and that plaintiff is entitled to have judgment entered in said

action for said sum; (3) that plaintiff is entitled to an order and decree directing the sale of the mortgaged lands and premises described in said complaint, and the application of the proceeds, as far as possible, to the satisfaction of the judgment to be entered upon said indebtedness."

DISCUSSION OF POINTS 2, 3, 4 AND 5

We will now discuss points (2), (3), (4) and (5), which are as follows:

- (2) That it is a matter of public policy of the State;
- (3) That neither the plaintiff nor anyone else can waive the same;
- (4) That it is one of the matters which can be raised at any time in any action;
- (5) That it is the duty of any court in Arizona upon facts coming to its attention, showing such disqualification, to immediately declare any and all acts of such foreign corporation wholly void.

The pertinent sections of Arizona Code Annotated 1939, which are rescripts of Sections 657, 658, Revised Code of Arizona, 1928, are as follows:

"53-801. REQUIREMENTS TO DO BUSINESS IN THIS STATE—CORPORATIONS EXCEPTED.—Any foreign corporation, before entering upon, doing, or transacting any business, enterprise, or occupation, in this state shall:

File a certified and authenticated copy of its articles of incorporation or charter with the corporation commission of this state;

Publish its articles of incorporation and file affidavit thereof as required of domestic corporations;

Appoint in writing over the hand of its president or other chief officer, attested by its secretary, a statutory agent in each county in this state in which such corporation proposes to carry on any business as required of domestic corporations;

Pay a license fee of fifteen dollars (\$15.00) to the corporation commission, and obtain from said corporation commission a license to do business in this state.

This section, however, shall not apply to insurance corporations, nor to any foreign corporation, the only business transaction of which, within the state, shall be the loaning of funds to religious, social or benevolent associations, or corporations organized for purposes other than profit."

X (§ "53-802. ACTS VOID UNLESS STATUTES COMPLIED WITH. — No foreign corporation shall transact any business in this state until it has complied with the requirements of the preceding section, *and every act done by said corporation prior thereto shall be void.* no amend

By the express language of the statute the indebtedness, the notes, the mortgage and all of the proceedings in the foreclosure case, and each and every act that Franklin did in this connection were and are wholly void.

A void contract is one which never had any legal existence or effect and cannot in any manner have life breathed into it.

National Union Indemnity Co. v. Bruce Bros. Inc.
44 Ariz. 455, 463; 38 P. (2) 648

“‘Void’ used in its strict sense, as being absolutely void, means that a proceeding to which it applies is an absolute nullity—without any force or effect. *McGarry v. Village of Wilmette*, 135 N. E. 96, 98; 303 Ill. 147.”

“A ‘void’ thing is no thing; it has no legal effect whatsoever; and no rights whatever can be obtained under it or grow out of it. In law it is the same thing as if the void thing had never existed.” *Mobile County v. Williams*, 61 So. 963, 965; 180 Ala. 639.

Vol. 7 Words & Phrases, Third Series, 875.

The allegations of Apache’s reply must be taken to be true on the motion for summary judgment. It alleges that at all of the times and dates specified in the defendant’s answer, and for many years thereafter down to May 28, 1941, the defendant wholly failed to qualify to do business in the State of Arizona, and that at all of said times and dates, and for a long time thereafter the said defendant was engaged in an enterprise of permanence and durability in the State of Arizona and did transact a substantial part of its ordinary business therein.

National Union Indemnity Co. v. Bruce Bros. Inc., supra.

We do not have to go farther than the decisions of the Supreme Court of Arizona on this subject. That Court in *National Union Indemnity Company v. Bruce Bros., Inc., supra.* uses the following language:

“But it is practically universally held that a party to an illegal contract cannot, either at the time of the execution of the contract or afterwards, waive his

right to set up the defense of illegality in any action thereon by the other party."

The Arizona Supreme Court in the case just cited quotes from *Hall v. Coppel*, 7 Wall, (74 U. S.) 542, 558, 19 L. Ed. 244, as follows:

"... In such cases there can be no waiver. The defense is allowed, not for the sake of the defendant, but of the *law itself*. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, *ex dolo malo non oritur actio*, is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A *stipulation* in most solemn form to *waive* the objection, would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the *law* will not lend its *support* to a claim founded upon its *violation*. *Morck v. Abel*, 3 Bosanquet & Puller, 35; *Armstrong v. Toler*, 11 Wheat. 258 (6 L. Ed. 468); *Collins v. Blantern*, 1 Smith's Leading Cases, 630, and notes.'"

In its opinion the Arizona Supreme Court then proceeds:

"See also, *Berka v. Woodward*, 125 Cal. 119, 57 Pac. 777, 73 Am. St. Rep. 31, 45 L. R. A. 420; *Embrey v. Jemison*, 131 U. S. 336, 9 Sup. Ct. 776, 33 L. Ed. 172; *Oscanyan v. Winchester Repeating Arms Co.*, 103 U. S. 261, 26 L. Ed. 539. Nor can a contract against *public policy* be made valid even by *ratification*. *United States v. Grossmayer*, 9 Wall.

72, 19 L. Ed. 627; *Ladd v. Rogers*, 11 Allen (Mass.) 209. The only exception to the general rule is that an account or contract which has been declared voidable only, for the protection or benefit of a certain party or class of parties, may be ratified unless such ratification is in contravention of public policy. *Norbeck, etc. Co. v. State*, 32 S. D. 189, 142 N. W. 847, Ann. Cas. 1916A 229. Were this contract one of the class which is voidable merely at the option of one of the parties, the defense of illegality could, of course, be waived. *Eastlick v. Hayward Lumber & Invest. Co.*, supra (33 Ariz. 242; 263 Pac. 936). But as we have pointed out, such is not the situation. Whatever the motive which induced the legislature to pass the section in question, it has made it applicable to all cases without exception. It has not merely, as in the case of the statutes of limitations, taken away the remedy but has denied the right. It has declared the contract void *ab initio*. This can be considered nothing but an expression of public policy upon the part of the state, and neither the *court* nor any *litigant* has the right to waive the provisions of the act. It is the *duty of the court* whenever the facts which render the contract void are *called to its attention*, to declare the law, and no party may recover in an action where the right of recovery must rest in some manner upon the void contract."

As the Supreme Court in *National Union Indemnity Company v. Bruce Bros., Inc.*, supra, points out, the statute has not merely, as in the case of statutes of limitations, taken away the remedy but has absolutely denied the right. The state has the unquestioned power to require a foreign corporation to qualify before it can lawfully do business in Arizona. The statute declares the said acts of the corporation defendant *void ab initio*. Thus

this requirement as to qualification of foreign corporations is a declaration not only of public policy, but an absolute requirement of our legislature. Until and unless a foreign corporation qualifies under the statute, any and all acts which it attempts to perform are absolutely and wholly void and no litigant has the right to waive the provisions of the act.

A companion case to the one just above cited is *Scott v. Bruce Bros., Inc.*, 44 Ariz. 469; 38 P. (2d) 654. These cases were consolidated and tried at the same time. Scott *had not pleaded* the lack of qualification of Bruce Bros. Inc., a foreign corporation, but had attempted, without success, to obtain leave to amend his pleadings on the trial. The Arizona Supreme Court said:

“Ordinarily, of course, a defendant may not on appeal urge a defense which was not set up in his pleading, but this is one of the *defenses which may be raised at any time.*”

The Arizona Supreme Court, to sustain this proposition, again makes the same quotation as appears above from Hall v. Coppell which is so brilliantly descriptive of the situation in this case that we will not attempt to comment upon it. In the Scott case the Arizona Supreme Court continues:

“It was the duty of the trial court upon such knowledge reaching it to hold immediately that no liability could be predicated as against any defendant upon the void contract. Such being the case, the trial court should have rendered judgment in favor of Scott on the ground that the contract upon which it was sought to hold him was void.”

Thereupon the Supreme Court of the State of Arizona reversed the Scott case with instructions to render judgment in favor of the defendant Scott. As the Apache did not answer the foreclosure case, knowledge of the Franklin's lack of qualification did not reach the court in that case.

As we have seen, it is wholly immaterial whether any party pleaded the lack of qualification of the foreign corporation; that when the facts appear in evidence in any court or in any proceeding such as the one at bar, which show that the foreign corporation had not qualified to do business, *it is the duty of the court*, sua sponte, to declare the law and decline to grant any relief to the party seeking the enforcement of such void contracts.

The judgment should be reversed, and the case remanded to the lower court with instructions to proceed with trial.

Respectfully submitted,

GUY AXLINE

KRAMER, MORRISON, ROCHE
& PERRY

By J. E. Morrison

First Natl. Bank Building,
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Attorneys for Appellant

United States
Circuit Court of Appeals
For the Ninth Circuit 7

THE APACHE LAND AND CATTLE COMPANY,
a corporation,

Appellant,

vs.

THE FRANKLIN LIFE INSURANCE COMPANY,
a corporation, et al.,

Appellees.

APPELLEE'S BRIEF

FILED

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PAUL P. O'BRIEN,
CLERK

UPON APPEAL FROM THE DISTRICT COURT
OF THE UNITED STATES FOR THE DIS-
TRICT OF ARIZONA

INDEX

	Page
Appellant's First Argument.....	4
Appellant's Second Argument.....	8
Argument	2
Discussion of Appellant's Argument.....	4
Statement of Pleadings and Facts Disclosing Jurisdiction	1

INDEX TO CASES CITED

Adams-Booth Co. vs. Reid (C. C. D. Nev.) 112 Fed. 106	4
Aetna Life Insurance Co. vs. Lyon County, 44 Fed. 329	11
Baltimore S. S. Co. vs. Phillips, 274 U. S. 316, 320; 47 Sup. Ct. 600, 602.....	7
Chicot County Drainage Dist. vs. Baxter State Bank, 308 U. S. 371, 378; 60 Sup. Ct. 317, 320	7
Citizens State Bank vs. McRoberts, 29 Ariz. 173, 177; 239 Pac. 1028, 1029.....	7
✓ Collister vs. Inter-State Fidelity Building and Loan Ass'n. of Utah, 44 Ariz. 427; 38 Pac. (2d) 626	4, 7, 11
Edmundson vs. Independent School Dist., 98 Iowa 639; 67 N. W. 671.....	11

INDEX TO CASES CITED, Continued

Grand Island and N. W. R. Co. vs. Baker, 6 Wyo. 369; 45 Pac. 494.....	11
Gray vs. Roberts, 12 Am. Dec. 383.....	4
Hall vs. Coppel, 7 Wall. (74 U. S.) 542, 558; 19 Law Ed. 244.....	10
Howard vs. Huron, 5 S. Dak. 539, 59 N. W. 833...	11
Kendall vs. Silver King Mining Co., 26 Ariz. 456; 226 Pac. 540.....	3
Lake County vs. Platt, 79 Fed. 567.....	11
Louisville & N. R. Co. vs. Railroad Commission, 205 Fed. 800.....	4, 5, 6
National Union Indemnity Company vs. Bruce Bros. Inc., 44 Ariz. 454; 38 Pac. (2d) 648...3, 6, 8	
Pick Mfg. Co. vs. General Motors Corporation, (C. C. A. 7) 80 Fed. (2d) 639, 641.....	7
Reorganized Catlin Consol. Canal Co. vs. Hinder- lider, 80 Colo. 522; 253 Pac. 389.....	4
✓ Scott vs. Bruce Bros., Inc., 44 Ariz. 469, 471; 38 Pac. (2d) 654, 655.....	3, 8, 10
Webster vs. Lowell, 2 Allen (Mass.) 123.....	11
34 C. J. 856, Note 52.....	3
34 C. J. 860.....	4

In the United States
Circuit Court of Appeals
For the Ninth Circuit
No. 10764

THE APACHE LAND AND CATTLE COMPANY,
a corporation,
Appellant,

vs.

THE FRANKLIN LIFE INSURANCE COMPANY,
a corporation, et al.,
Appellees.

APPELLEE'S BRIEF

**STATEMENT OF PLEADINGS AND FACTS
DISCLOSING JURISDICTION**

The statement appearing on pages 2 and 3 of Appellant's Opening Brief is correct and Appellee, for brevity, makes reference thereto.

ARGUMENT

For brevity Appellant will hereinafter be referred to as "Cattle Company" and Appellee as "Insurance Company".

The case before the Court reduces itself to a rather simple question. In August 1940, Insurance Company obtained a judgment (T. R. 16-23) foreclosing a mortgage executed by Cattle Company July 1, 1930 (T. R. 17) covering the same lands (T. R. 21) involved in the present action (T. R. 3). Cattle Company appeared in the foreclosure action and confessed judgment (T. R. 18). The lands were sold under special execution (T. R. 29-32) and in due time Sheriff's Deed to Insurance Company was issued (T. R. 37-43) covering these lands.

Cattle Company now seeks by this independent action to quiet title to the same lands in it, alleging (T. R. 12-13) that the Insurance Company was at the time of receiving the mortgage and at all times subsequent, until after the issuance of Sheriff's Deed, a foreign corporation not qualified in Arizona and at all of said times engaged in an enterprise of permanence and durability in the State and transacting within the State a substantial part of its ordinary business. From this the conclusion is drawn (T. R. 13) that the mortgage and all subsequent proceedings were totally void. Insurance Company took the position below in which it was sustained by the District Court by granting a summary judgment (T. R. 46)

that the issues presented in this collateral action were res judicata by virtue of the judgment (T. R. 16-23) in the foreclosure action.

1. Had Cattle Company presented and sustained the issue here raised as to nonqualification and doing business by the Insurance Company in the foreclosure proceeding judgment could not have been rendered therein for Insurance Company.

National Union Indemnity Company vs. Bruce Bros., Inc., 44 Ariz. 454; 38 Pac. (2d) 648.

2. This would have been true even though the issue were not pleaded but appeared from the evidence before the Court.

Scott vs. Bruce Bros., Inc., 44 Ariz. 469, 471; 38 Pac. (2d) 654, 655.

3. The issue as to Insurance Company doing business while not qualified was a defense which could have been raised in the foreclosure action to show the invalidity of the mortgage and defeat the right of Insurance Company to maintain that action. The judgment in favor of Insurance Company in the foreclosure action therefore bars the Cattle Company from maintaining any subsequent action attacking the foreclosure on that or any other ground which could have been raised as a defense in the foreclosure action.

34 C. J. 856, Note 52.

Kendall vs. Silver King Mining Co., 26 Ariz. 456; 226 Pac. 540.

Adams-Booth Co. vs. Reid (C. C. D. Nev.) 112
Fed. 106.

4. This rule is applicable even though the defense now sought to be relitigated is that the transaction was illegal or contrary to public policy.

34 C. J. 860.

Gray vs. Roberts, 12 Am. Dec. 383.

Reorganized Catlin Consol. Canal Co. vs. Hinderlider, 80 Colo. 522; 253 Pac. 389.

Collister vs. Inter-State Fidelity Building and Loan Ass'n. of Utah, 44 Ariz. 427; 38 Pac. (2d) 626.

DISCUSSION OF APPELLANT'S ARGUMENT

The Cattle Company seeks to avoid the effect of the rules set forth above by two lines of argument. *First*, that the judgment in foreclosure expressed the issues determined upon which relief was granted and that therefore only such issues are *res judicata*. *Second*, that the issue of nonqualification while doing business is an issue which may be raised at any time in any action without regard to prior adjudication.

Appellant's First Argument

The first point depends entirely on the case of *Louisville & N. R. Co. v. Railroad Commission*, 205

Fed. 800. Cattle Company's brief (p. 8) quotes from 34 C. J. 859, but examination discloses that the rule as there stated is supported only by the *Louisville & N. R. Co.* case above. In the *Louisville & N. R. Co.* case, in a prior proceeding, a series of acts of the Alabama legislature establishing rates on intrastate business had been held unconstitutional as confiscatory and the Railroad Commission had been enjoined from enforcing the acts. Subsequently it directed the railroad to put into effect a passenger rate of $2\frac{1}{2}$ c a mile, which was one of the rates included in the series of acts. The railroad thereupon asked for a rule directed to the Railroad Commission to show cause why it was not in contempt in ordering the establishment of a passenger rate. The Court held that the prior decree did not actually determine that the passenger rate was unreasonable, but simply that the schedule of rates as a whole was confiscatory. The Court could have reached this decision whether the passenger rate alone was or was not confiscatory, and therefore the Court not having expressly passed upon it the issue was not foreclosed by the doctrine of res judicata. In other words, the Court in the prior decision could have decided that the passenger rates were either reasonable or unreasonable and still have decided that the entire schedule of rates, as a whole, was confiscatory. Therefore, the decision which it did render that the entire schedule was confiscatory did not necessarily include a decision either way as to the passenger rates alone.

In the present case Cattle Company contends that

the findings in the judgment on the issues (T. R. 19) do not mention the issue of nonqualification and doing business, and that therefore that issue is not *res judicata*. An examination of the three findings shows that the Court decided *first*, that the allegations of the complaint and supplemental complaint were true, *second*, that the defendant (Cattle Company) was indebted to the plaintiff (Insurance Company) in the sum of two hundred twenty-five thousand dollars (\$225,000.00), and that the plaintiff (Insurance Company) was entitled to have judgment entered for said amount, and, *third*, that the plaintiff (Insurance Company) was entitled to a decree directing the sale of the mortgaged lands and the application of the proceeds to its debt. We submit that these findings are not findings on the issues upon which judgment was rendered such as are referred to in the *Louisville & N. R. Co. case, supra*, but are at best statements or findings found in all so-called general judgments.

Even though they were to be considered as findings on issues within the meaning of the *Louisville & N. R. Co. case, supra*, still unlike that case a decision in the foreclosure case in favor of Cattle Company's present position as to doing business and nonqualification would have prevented the court from making the "findings" it actually made, and in addition from entering the judgment which it did enter.

National Union Indemnity Company vs. Bruce Bros. Inc., supra.

Therefore the foreclosure judgment is *res judicata*

on the point of doing business while not qualified against the contention of the Cattle Company.

Baltimore S. S. Co. vs. Phillips, 274 U. S. 316, 320; 47 Sup. Ct. 600, 602;

Citizens State Bank vs. McRoberts, 29 Ariz. 173, 177; 239 Pac. 1028, 1029;

Collister vs. Inter-State Fidelity Building and Loan Ass'n. of Utah (Ariz.), *supra*.

Nor is it material that the issue was neither considered nor raised in the foreclosure case.

Chicot County Drainage Dist. vs. Baxter State Bank, 308 U. S. 371, 378; 60 Sup. Ct. 317, 320;

Pick Mfg. Co. vs. General Motors Corporation (C. C. A. 7) 80 Fed. (2d) 639, 641; and cases cited therein;

Collister vs. Inter-State Fidelity Building and Loan Ass'n. of Utah, *supra*, states the rule as follows:

“Neither does the fact that the question of usury was not made an issue necessarily have this effect, since nothing can be litigated in a subsequent action between the same parties that was a proper subject of inquiry in the first but not considered merely because the defendant who was

personally served failed to answer and raise it. 'It is well settled,' to use the language of this court in *Citizens' State Bank v. McRoberts*, 29 Ariz. 173, 239 P. 1028, 1029, 'that all matters in issue, *or which could have been put in issue*, in the action to collect the note were conclusively settled by the judgment in that cause. * * *' Appellant claims that this statement of the law is too broad but it is supported both by reason and authority and we see no occasion to modify it." (Emphasis ours.)

Appellant's Second Argument

Cattle Company's second argument (T. R. 9) is that the issue of nonqualification while doing business may be raised at any time in any action without regard to prior adjudication. Basically the entire argument on this point depends upon the two decisions of the Arizona Supreme Court in the cases of *National Union Indemnity Co. vs. Bruce Bros., Inc.*, 44 Ariz. 454; 38 Pac. (2d) 648 and *Scott vs. Bruce Bros., Inc.*, 44 Ariz. 469; 38 Pac. (2d) 654. The two cases arise out of the same basic facts. Bruce Bros., a foreign corporation not qualified in Arizona, entered into a contract to do highway work in the State and in pursuance of this work made a subcontract with Scott by which he was to deliver gravel on the work. Scott defaulted on the contract and Bruce Bros. brought action against him and against the surety for damages for default in performance. The surety company pleaded nonqualification of Bruce Bros. as a defense.

Scott's original pleading did not set up this point, but at the trial he asked leave to amend to raise it. This was granted by the Court upon condition as to payment of Scott's costs, which Scott refused to meet, and the plea therefore was not in Scott's pleading. Upon the trial the surety company introduced evidence to establish the doing of business by Bruce Bros. and its nonqualification. The lower court ruled that the surety company had not sustained the burden on this point and proceeded to an adjudication on the main cause of action. From a judgment against the defendants the surety company and Scott prosecuted separate appeals resulting in the two decisions above-mentioned. On the surety company's appeal it was contended that as Scott had not raised the defense of nonqualification the surety could not do so, and that therefore in effect the defense was waived. The Court held in the surety company's appeal that the defense could not be waived in any action by the other party, and on Scott's appeal the Court held it immaterial that the pleadings did not raise the point because the evidence had actually appeared in the case below and the defense being one not waivable when the evidence did appear in the court below the court should proceed as though the evidence were properly before it under the pleadings. The Court's holding is simply stated on page 471 of the Arizona Report, page 655 of the Pacific Report, as follows:

"We think that under the circumstances whenever it appeared to the trial court in the pleadings and the evidence that the contract upon which

plaintiff sought to enforce a liability against either or both of the defendants was void *ab initio*, that it makes no difference in whose pleadings or through whose evidence that fact became known. It was the duty of the trial court upon such knowledge reaching it to hold immediately that no liability could be predicated as against any defendant upon the void contract."

The cases involve no question of *res judicata* and simply hold that the defense of illegality when not pleaded but when shown by the evidence is to be considered by the court nonetheless. The basis of the Court's decision is found in its quotation from *Hall vs. Coppel*, 7 Wall. (74 U. S.) 542, 558, 19 Law Ed. 244 that "The defense is allowed, not for the sake of the defendant, but of the law itself * * * Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case." Neither the case of *Scott vs. Bruce Bros., Inc.* nor the cases cited therein upon which it relies involved a question of prior adjudication. The only reason for making a distinction between the issue here raised by the Cattle Company and any other defense which could conceivably have been offered in the foreclosure case is that this issue involves illegality and public policy. However, when the defense of illegality is raised in a case involving prior adjudication it is clear that the Arizona Supreme Court makes no distinction and holds that a defense of illegality may be barred by prior adjudication in the same manner as any other defense.

*Collister vs. Inter-State Fidelity Building and
Loan Association of Utah (Ariz.) supra.*

We have found no cases involving the doctrine of res judicata as applied to the statute upon which Cattle Company here bases its claim. However, there are cases which are squarely on all fours in the principle and which clearly negative plaintiff's (Cattle Company's) contention in this case. These cases relate to the enforcement of judgments obtained against municipalities for the payment of bonds or other evidences of indebtedness to which the municipalities attempted to assert a defense based upon a constitutional limitation. It will be found that the courts generally hold that such a defense was not available because it was not asserted in the original suit upon the bonds. Of this character are the following cases:

Aetna Life Insurance Co. vs. Lyon County, 44
Fed. 329.

Lake County vs. Platt, 79 Fed. 567.

Howard vs. Huron, 5 S. Dak. 539; 59 N. W.
833.

Webster vs. Lowell, 2 Allen (Mass.) 123.

Grand Island and N. W. R. Co. vs. Baker, 6
Wyo. 369; 45 Pac. 494.

Edmundson vs. Independent School Dist., 98
Iowa 639; 67 N. W. 671.

Basically Cattle Company's entire case rests upon the extension of the language used in the *Bruce Bros. cases, supra*, to cover a case not there presented, that of a prior adjudication, and it should be noted logically that if the language is to be so considered it would be applicable whether in the prior case the issue had not been raised but was necessarily involved, or had been raised and decided against the contention of the proponent of the issue. In other words, Cattle Company's position is that the issue of nonqualification while doing business can never become res judicata.

We respectfully submit that the Cattle Company cannot in this collateral proceeding attack the judgment in the foreclosure proceedings upon any of the grounds urged by the Cattle Company. The judgment below should be affirmed.

Respectfully submitted,

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No. 10775

United States
Circuit Court of Appeals
For the Ninth Circuit.

JESSIE F. KING and GEORGE C. KING,
Appellants,
vs.

J. H. YANCEY, doing business under the firm
and/or fictitious name of YANCEY INSU-
LATION CO.,
Appellee.

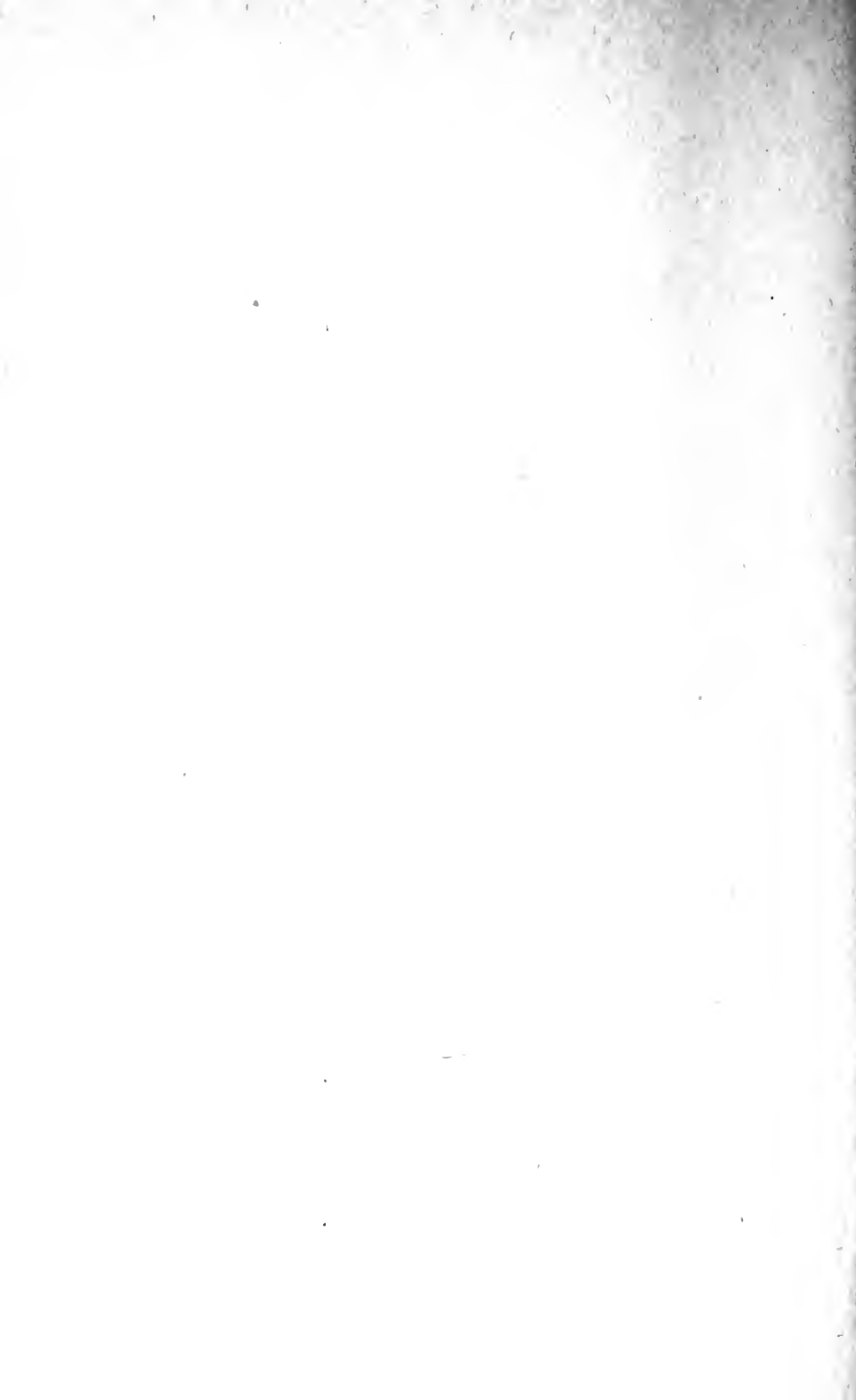
Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Nevada

FILED

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PAUL P. O'BRIEN,
CLERK



No. 10775

United States
Circuit Court of Appeals
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JESSIE F. KING and GEORGE C. KING,
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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

Page

Appeal:

Certificate of Clerk to Transcript of Record on	35
Designation of Contents of Record on	37
Notice of	26
Statement of Points on	29
Undertaking for Costs on	27
Certificate of Clerk to Transcript of Record on Appeal	35
Complaint	2
Decision, Opinion and	17
Designation of Contents of Record on Appeal..	37
Motion to Dismiss, and Notice of Motion.....	15
Names and Addresses of Attorneys	1
Notice of Appeal	26
Opinion and Decision	17
Record of Notation on Docket	26
Statement of Points on Appeal	29
Summons and Sheriff's Return	13
Undertaking for Costs on Appeal	27



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No. 75734

Dept. 1.

In the Second Judicial District Court of the State
of Nevada, In and For the County of Washoe

JESSIE F. KING and GEORGE C. KING,
Plaintiffs,

vs.

J. H. YANCEY, doing business under the firm
name and/or fictitious name of Yancey Insula-
tion Co.,

Defendant.

COMPLAINT

Come now the Plaintiffs above named, and for
cause of action against the Defendant, allege as
follows:

I.

That at all times and dates herein mentioned,
and for many years, the above-named Plaintiffs
have been, and now are, husband and wife, and at
all times and dates herein mentioned, and for a
long time past have been, and now are, residents
of Reno, Washoe County, Nevada.

II.

That at all times and dates herein mentioned
the Defendant, J. H. Yancey, resided, and still
resides, at 817-25th Street, Sacramento, California,
and did transact business under the firm and/or
[2] fictitious name of Yancey Insulation Co., at
817 East 4th Street, in the City of Reno, County

of Washoe, State of Nevada; and that at said address said Defendant carried on a general business of the insulation of building structures, and some related lines and business.

III.

That at all of the times and dates hereinafter mentioned, and for a considerable time before, the said George C. King, one of the Plaintiffs above named, was regularly employed by the Defendant, J. H. Yancey, to solicit business for the said Defendant, and particularly the business of insulating building structures of all kinds and descriptions; that in the regular course of his employment, he worked out of the business house or place where the business of the Defendant was conducted, at 817 East 4th Street, Reno, Nevada, reporting there, arranging his material and using said building where said business was conducted, as aforesaid, at all times when not actually in the field soliciting business; and that the said George C. King, in the regular course of his employment, had a key to the main entrance of said building where said business was conducted by the Defendant, as aforesaid, and in the regular course of his service and employment by the Defendant, entered said building at all times and all hours and on all days for the purpose of facilitating and carrying on his employment under the terms thereof.

That on or about Sunday, July 19, 1942, the said George C. King, in the regular course of his em-

ployment, made preparations to call upon a prospective customer of [3] the Defendant for an insulation job at Bridgeport, California, on the following day, and said preparations were as follows: The said George C. King, being an elderly man and in very poor health, and subject to falling asleep without warning, requested his wife, Jessie F. King, one of the Plaintiffs herein, to accompany him on a trip by automobile to Bridgeport, California, in order that she might be with him and be able to aid and assist him in the event that he should need such aid and assistance on said trip.

That the said Plaintiff, Jessie F. King, consented to, and agreed to, accompany said George C. King for the reasons and purposes just mentioned, and in pursuance of said arrangement and plan went with the said George C. King in his automobile on the morning of Sunday, July 19, 1942, to the business place of the Defendant, at 817 East 4th Street, Reno, Nevada, in order that in pursuance of the carrying out by said George C. King of the requirements of his employment by the Defendant, the said George C. King could there get certain materials and samples which he in turn intended to exhibit to the prospective customer of the Defendant hereinabove mentioned.

That said George C. King stopped his automobile in front of the main entrance of Defendant's business building aforesaid, and entered said building, the said Plaintiff, Jessie F. King, remaining in the car; that a short time later the said George

C. King came out of said building to the car and stated to the Plaintiff, Jessie F. King, that the trip to the first point of stoppage en [4] route to Bridgeport, California, would be a long trip, said George C. King planning to go by way of Lake Tahoe, that facilities in which one could perform the exigencies of nature would not be easily available for a long period of time, and suggested that the said Plaintiff, Jessie F. King, come in the building and use the toilet before starting on the journey; thereupon Plaintiff, Jessie F. King, said that it was not at that time necessary, and said George C. King returned into the business building of the Defendant, but within a few moments Plaintiff, Jessie F. King, left the automobile and herself went into the business building of the Defendant and stated that she had decided that it would be necessary and advisable to use the toilet facilities in the Defendant's establishment before commencing the journey.

That Defendant's business building consisted of a one-story structure approximately twenty-five (25) feet in width, facing upon East 4th Street in Reno, Nevada, and approximately seventy-five (75) feet in length; that the main entrance to said building was a door located in the center of the building; that when one entered that door, about ten (10) or fifteen (15) feet from the door a partition was across the entire width of the building; that approximately in the center of said partition, or somewhat to the left of center as one faces it from the street entrance, an opening or doorway

without a door being hung in place was in said partition; that some three (3) or four (4) feet behind this opening a screen, approximately the same with as the opening, was in place so that one passing through the opening was required to [5] turn to the left and then to the right in order to enter the rear portion of the building; and that as one turned to the right he was within approximately ten (10) or twelve (12) feet of the west or lefthand wall as one approached from the main entrance.

That upon the said Plaintiff, Jessie F. King, stating that she desired to use the toilet facilities, as she was requested to do by said George C. King, the said George C. King, who at that time, with the said Plaintiff, Jessie F. King, was in the front office section of the building, and between the partition and the street, turned toward the open place in the partition, and pointing in that direction said, "You will find the toilet in there: The door is partly open"; that thereupon Plaintiff, Jessie F. King, went through the opening in the partition, turned to the left to avoid the screen, and turned to the right; almost directly before her, at a distance of approximately twenty (20) feet, more or less, appeared a door, partly open, hanging in a wall which came out of the main west wall some two (2) feet wider than the door, and then ran northerly to the north wall of the main structure; that said door was the only door which could be seen by a person entering said rear portion of Defendant's business building as the Plain-

tiff, Jessie F. King, was required to enter said rear portion of said building.

That the partition, heretofore mentioned, across from the west to the eastern wall of Defendant's business building, was a high partition, rising to within a few feet of the ceiling, and the screen north of the opening in this partition heretofore referred to was a [6] high screen but not quite as high as the partition itself; that the Defendant had been using the rear room for showing moving pictures of insulation jobs, and the only two windows in the rear portion of said building were covered with a black paper which shut out all light from entering the back room; that the available light in the back room was that which came from the street side of the building, which was almost all glass, there being two large windows on each side of the door and the door having a glass panel, and which found its way into the rear room over the top of the partition; that although the light was poor, the Plaintiff, Jessie F. King, could see the open door reasonably clearly; that said door was hinged on the west side and opened out toward the south; that said Plaintiff, Jessie F. King, approached said door, took the knob or handle of the door in her left hand, opened the door with her left hand, and as she did so the light from the front windows coming over the partition lighted the top portion of the structure into which the door entered, and the Plaintiff, Jessie F. King, saw the walls, and, relying upon the directions which had been given to her by said George C.

King, stepped forward into the small structure, believing it to be the toilet; that as Plaintiff, Jessie F. King, stepped forward, her foot did not contact a floor, as anticipated, but the entrance was to a steep flight of stairs and the sudden stepping down the first step, which was almost immediately behind the door, threw the Plaintiff, Jessie F. King, off her balance, and she was catapulted down a long flight of stairs to the cellar of said building; that there was no warning sign on said door [7] of any kind or character, or any sign at all; that there was no rail, chain or other protective device of any kind or character to prevent a person from falling down the said stairway, and no precaution of any kind, character or description was provided by the Defendant either to warn a person of the dangerous character of the stairway, dropping as it did almost immediately from behind the door; that there was no light or other device of any kind or character to show the presence of the dangerous conditions, as above described; that Defendant had been put on notice before Sunday, July 19, 1942, by other persons almost falling down said stairway; and that said stairway in the condition in which it existed was dangerous and a menace to persons rightly in said building and using the facilities thereof.

That as Plaintiff, Jessie F. King, entered the rear portion of Defendant's business building, as aforesaid, it was impossible for her to see that there existed a door entering what was actually the toilet, said toilet being located in the area above the

stairway, and entered by a door on the sidewall of the structure in which the stairway was located, which said door opened inwardly and could not therefore protrude or be visible to the Plaintiff, Jessie F. King.

IV.

Plaintiffs allege that the Defendant, J. H. Yancey, was negligent and careless in the following manner:

1. In maintaining a dangerous stairway, as heretofore described, in the premises of [8] the Defendant.

2. In failing to have, keep and maintain any guardrail or other means of preventing persons from falling down said stairs.

3. In failing to maintain a light in said stairway area, so that one entering the doorway thereto could see the dangerous and open stairway.

4. In failing to maintain any sign or other warning to indicate the dangerous character of said stairway.

5. In failing to maintain any sign or other warning to indicate that said door lead to a stairway.

6. In failing to warn said Plaintiff, Jessie F. King, of the existence of said dangerous stairway.

7. In failing to properly instruct the said Plaintiff, Jessie F. King, as to the location of the toilet in said premises, and in permitting her, because of the failure of proper instructions, to enter the door to the stairway instead of entering the door to the toilet, which latter door could not be seen by the Plaintiff, Jessie F. King, in entering the said rear portion of Defendant's business building.

8. In failing to keep said premises of the Defendant in a reasonably safe condition so that those invited to enter therein would [9] not be unnecessarily exposed to danger.

9. For maintaining a dangerous stairway without a platform of reasonable width before the first and top step of said stairway.

10. In failing to exercise due and reasonable care for the safety of the Plaintiff, Jessie F. King, after she was invited to enter the premises of the Defendant.

V.

That solely by reason of, and as a direct and proximate result of, the negligence and carelessness of the Defendant, the Plaintiff, Jessie F. King, was severely injured; that the said Plaintiff, Jessie F. King, suffered a fracture of the left os calcis; that the said os calcis was comminuted and flattening and distortion of the tuber angle and some lateral separation of the comminuted fragments; that Plaintiff, Jessie F. King, struck her head, in the fall down the stairway, and was knocked unconscious; that the Plaintiff, Jessie F. King, also suffered a separation of the left sterno-clavicular joint; that the left side of the body of the Plaintiff, Jessie F. King, was badly bruised; that said Jessie F. King was taken immediately to the hospital, and that after ten days of preliminary treatment, during which reduction was attempted to improve the lateral separation of the fragments, without success, there being a marked disability of the sub-astragaloid joint, the injured foot of

the Plaintiff, Jessie F. King, was put in a cast, which said Plaintiff was required to wear for a period of two months; that since said accident and injuries, Plaintiff, Jessie F. King [10] has suffered, and continues to suffer, great and severe pain in her head, her side, and in the injured foot; that said Plaintiff, Jessie F. King, is not able to walk upon said left foot, and is, and will remain, permanently injured and crippled for the rest of her life; that Plaintiff's said injuries, as aforesaid, and the medical treatment which it was necessary for her to undergo, in her attempts to be cured of said injuries, have caused said Plaintiff, Jessie F. King, to suffer extreme pain, nervous shock and mental anguish, and have caused, and still continue to cause, said Plaintiff, Jessie F. King, great bodily discomfiture and pain, and Plaintiff, Jessie F. King, is informed and believes that in the future she will continue to suffer pain and nervous shock and irritation, as a direct result of her said injuries; that as a result of the severe, intense and agonizing physical and mental pain suffered by the Plaintiff, Jessie F. King, the said Plaintiff is injured in health and constitution, weakened in body and mind, and permanently disabled, so that she will be unable to enjoy the ordinary pleasures of life experienced by others, and has, does now, and will continue to suffer great and grievous mental agony and anguish because of her permanent disability, all to the damage of Plaintiff, Jessie F. King, in the sum of Twenty Thousand Dollars (\$20,000.00).

Wherefore, Plaintiffs pray damages in the sum of Twenty Thousand Dollars (\$20,000.00) in their favor and against the Defendant herein, together with costs of suit.

CLYDE D. SOUTER

Attorney for Plaintiffs [11]

State of Nevada,
County of Washoe—ss.

Jessie F. King and George C. King, being first duly sworn, depose and say:

That they are the Plaintiffs in the above-entitled action; that they have read the foregoing complaint and they know the contents thereof; that the same is true of their own knowledge, except as to those matters therein stated on information and belief, and as to those matters they believe it to be true.

JESSIE F. KING

GEORGE C. KING

Subscribed and sworn to before me this 29th day of March, 1943.

[Seal]

FRANCES M. SCOTT

Notary Public in and for the County of Washoe,
State of Nevada.

My Commission Expires Sept 25, 1943.

[Endorsed]: Filed May 25, 1943. E. H. Beemer,
Clerk, By V. Whitehead, Deputy.

[Endorsed]: No. 302. U. S. Dist. Court, Dist.
Nevada. Filed Aug. 19th, 1943. O. E. Benham,
Clerk. [12]

[Title of Court and Cause.]

SUMMONS

The State of Nevada Sends Greetings to the Said
Defendant:

You are hereby summoned to appear within ten day after the service upon you of this Summons if served in said county, or within twenty days if served out of said county but within said Judicial District, and in all other cases within thirty days (exclusive of the day of service), and defend the above entitled action.

Dated this 25th day of May, A. D. 1943.

[Seal]

E. H. BEEMER

Clerk of the Second Judicial District Court of the
State of Nevada, in and for Washoe County.

By V. WHITEHEAD,

Deputy

CLYDE D. SOUTER,

15 W. 2nd St., Reno, Nevada.

Attorney for Plaintiff

SHERIFF'S RETURN

State of Nevada

County of Washoe—ss.

I hereby certify and return that I received the within Summons on the day of, A. D. 194..., and that I personally served the same upon the within named defendant by showing the original summons to and delivering to a copy of the same, in Washoe

County, State of Nevada, on the day of
, A. D. 194....., and I further re-
 turn that I delivered to the said
 a certified copy of the Complaint in said within
 entitled action, with a copy of the Summons at-
 tached, at the same time and place. [13]

Dated this day of,
 A. D. 194.....

.....
 Sheriff of Washoe County,
 Nevada.

By
 Deputy Sheriff

[Endorsed]: Filed July 13, 1943. E. H. Beemer,
 Clerk. By M. Jensen, Deputy.

[Endorsed]: No. 302. U. S. Dist. Court, Dist.
 Nevada. Filed Aug. 19th, 1943. O. E. Benham,
 Clerk. [14]

SHERIFF'S OFFICE

State of Nevada

County of Washoe—ss.

I hereby certify and return that I received the
 within Summons on the 25th day of May, A. D.
 1943, and that I personally served the same upon
 the within named defendant J. H. Yancy by show-
 ing the original Summons to him and delivering
 to him a copy of the same, in Washoe County,
 State of Nevada, on the 12th day of July, A. D.

1943, and I further return that I delivered to the said J. H. Yancy a certified copy of the complaint in said within entitled action, with a copy of the Summons attached at the same time and place.

Dated this 13th day of July, A. D. 1943.

RAY J. ROOT

Sheriff of Washoe County,
State of Nevada.

By **FRANCIS A. MORTENSEN,**
Deputy [15]

In the District Court of the United States,
In and for the District of Nevada

JESSIE F. KING and GEORGE C. KING,
Plaintiffs,

vs.

J. H. YANCEY, doing business under the firm
and/or fictitious name of **YANCEY INSULA-
TION CO.,**

Defendant.

MOTION TO DISMISS

The defendant moves the Court as follows:
To dismiss the above action because the com-

plaint fails to state a claim against defendant upon which relief can be granted.

E. F. LUNSFORD, and

BERT GOLDWATER

Attorney for Defendant

Address: 409 First National Bank (Main Office) Building, Reno, Nevada.

NOTICE OF MOTION

To Jessie F. King and George C. King, above plaintiffs, and Clyde D. Souter, Esq., Attorney for said plaintiffs:

Please Take Notice that the undersigned will bring the above Motion on for hearing before this Court at the Court Room of said Court, Post Office Building, Carson City, Nevada, [16] on the 30th day of August, 1943, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

E. F. LUNSFORD, and

BERT GOLDWATER

Attorneys for Defendant

Address: 409 First National Bank (Main Office) Building, Reno, Nevada.

Service of the above and foregoing Motion to Dismiss and Notice of Motion, by copy, is hereby admitted this 20th day of August, 1943.

CLYDE D. SOUTER

Attorney for Plaintiffs.

[Endorsed]: Filed Aug. 21, 1943. O. E. Benham Clerk. By M. R. Grubie, Deputy.

In the District Court of the United States of
America, In and For the District of Nevada

No. 302

JESSIE F. KING and GEORGE C. KING,
Plaintiffs,

vs.

J. H. YANCEY, doing business under the firm
and/or fictitious name of YANCEY INSULA-
TION CO.,

Defendant.

OPINION AND DECISION

Norcross, District Judge.

This is a case removed from the State District Court of Washoe County. Plaintiffs are husband and wife. Defendant is a resident of Sacramento, California, engaged in carrying on a general business of the insulation of building structures and, for that purpose, maintains a business office and center in a building located in Reno, Nevada. Plaintiff,

George C. King, was employed as a salesman by defendant. The prayer of plaintiff's complaint is for a judgment for damages for alleged personal injuries, sustained by Plaintiff, Jessie F. King, while within defendant's said building, in the sum of Twenty Thousand Dollars. To plaintiff's complaint, defendant has interposed a motion to dismiss upon the ground that "the complaint fails to state a claim against defendant upon which relief can be granted." The motion to dismiss has been submitted upon briefs filed.

The allegations of fact appearing in the complaint which appear to be controlling of the question of law presented [18] upon the motion are the following:

"* * * that at said address said defendant carried on a general business of the insulation of building structures, and same related lines of business. * * * That * * * the said George C. King, * * * was regularly employed by the Defendant, J. H. Yancey, to solicit business for the said Defendant, and particularly the business of insulating building structures * * * ; that in the regular course of his employment, he worked out of the business house or place where the business of the Defendant was conducted, * * *, reporting there, arranging his material and using said building * * *, at all times when not actually in the field soliciting business; and that * * *, in the regular course of his employment, had a key to the main entrance of said building where said business was conducted * * *, and in the regular course of his service and employment

by Defendant, entered said building at all times and all hours and on all days for the purpose of facilitating and carrying on his employment under the terms thereof.

“That on or about Sunday, July 19, 1942, the said George C. King, in the regular course of his employment, made preparations to call upon a prospective customer of the Defendant for an insulation job at Bridgeport, California, on the following day, and said preparations were as follows: The said George C. King, being an elderly man and in very poor health, and subject to falling asleep without warning, requested his wife, Jessie F. King, one of the plaintiffs herein, to accompany him on a trip by automobile to Bridgeport, California, in order that she might be with him and be able to aid and assist him in the event that he should need such aid and assistance on said trip.

“That the said Plaintiff, Jessie F. King, consented to, and agreed to, accompany said George C. King for the reasons and purposes just mentioned, and in pursuance of said arrangement and plan went with the said George C. King in his automobile on the morning of Sunday, July 19, 1942, to the business place of the Defendant, at 817 East 4th Street, Reno, Nevada, in order that * * * said George C. King could there get certain materials and samples which he in turn intended to exhibit to the prospective customer of the Defendant hereinabove mentioned.

“That said George C. King stopped his automobile in front of the main entrance of Defendant’s

business building aforesaid, and entered said building, the said Plaintiff, Jessie F. King, remaining in the car; that a short time later the said George C. King came out of said building to the car and stated to the Plaintiff, Jessie F. King, that the trip to the first point of stoppage en route to Bridgeport, California, would be a long trip, said George C. King planning to go by way of Lake Tahoe, that facilities in which one could perform the exigencies of nature would not be easily available for a long period of time, and suggested [19] that the said Plaintiff, Jessie F. King, come in the building and use the toilet before starting on the journey; thereupon Plaintiff, Jessie F. King, said that it was not at that time necessary, and said George C. King returned into the business building of the Defendant, but within a few moments Plaintiff Jessie F. King, left the automobile and herself went into the business building of the Defendant and stated that she had decided that it would be necessary and advisable to use the toilet facilities in the Defendant's establishment before commencing the journey.

“That Defendant's business building consisted of a one-story structure approximately twenty-five (25) feet in width, * * * and approximately seventy-five (75) feet in length; that the main entrance * * * was a door located in the center of the building; that when one entered that door, about ten (10) or fifteen (15) feet from the door a partition was across the entire width of the building; that approximately in the center of said partition, * * * an opening * * * was in said partition; that some three (3) or

four (4) feet behind this opening a screen, approximately the same width as the opening, was in place so that one passing through the opening was required to turn to the left and then to the right in order to enter the rear portion of the building; and that as one turned to the right he was within approximately ten (10) or twelve (12) feet of the west or lefthand wall as one approached from the main entrance.

“That upon the said Plaintiff, Jessie F. King, stating that she desired to use the toilet facilities, as she was requested to do by said George C. King, the George C. King, who at that time, with the said Plaintiff, Jessie F. King, was in the front office section of the building, * * * turned toward the open place in the partition, and pointing in that direction said, “You will find the toilet in there. The door is partly open”; that thereupon Plaintiff, Jessie F. King, went through the opening in the partition, turned to the left to avoid the screen, and turned to the right; almost directly before her, at a distance of approximately (20) feet, more or less, appeared a door, partly open, hanging in a wall which came out of the main west wall some two (2) feet wider than the door, and then ran northerly to the north wall of the main structure; that said door was the only door which could be seen by a person entering said rear portion of Defendant’s business building as the plaintiff, Jessie F. King, was required to enter said rear portion of said building.

“That the partition, * * * across from the west to the eastern wall * * * was high partition, rising

to within a few feet of the ceiling, and the screen north of the opening in this partition * * * was a high screen but not quite as high as the partition itself; that the Defendant had been using the rear room for showing moving pictures of insulation [20] jobs and the only two windows in the rear portion of said building were covered with a black paper which shut out all light from entering the back room; that the available light in the back room was that which came from the street side of the building, which was almost all glass, * * * and which found its way into the rear room over the top of the partition; that although the light was poor, the Plaintiff, Jessie F. King, could see the open door reasonably clearly; that said door was hinged on the west side and opened out toward the south; that said Plaintiff, Jessie F. King, approached said door, * * * opened the door with her left hand, and as she did so the light from the front windows coming over the partition lighted the top portion of the structure into which the door entered, and the Plaintiff, Jessie F. King, saw the walls, and, relying upon the directions which had been given to her by said George C. King, stepped forward into the small structure, believing it to be the toilet; that as Plaintiff, Jessie F. King, stepped forward, her foot did not contact a floor, as anticipated, but the entrance was to a steep flight of stairs and the sudden stepping down the first step, * * * threw the Plaintiff, Jessie F. King, off balance, and she was catapulted down a long flight of stairs to the cellar of said building;

* * * that said stairway in the condition in which it existed was dangerous * * *.

“That as Plaintiff, Jessie F. King, entered the rear portion of * * * building, * * * it was impossible for her to see that there existed a door entering what was actually the toilet, said toilet being located in the area above the stairway, and entered by a door on the sidewall of the structure in which the stairway was located, which said door opened inwardly * * *.”

The questions of law presented upon the motion to dismiss, are whether, upon the facts alleged, Plaintiff, Jessie King, at the time of her injury, was in the status of an invitee or that of a mere licensee, and any liability which may depend upon such respective status. Plaintiff, George King, was neither owner or occupant of the premises. An occupant, as that term is used in cases of this character, means one in possession by authority of the owner such as, for example, a lessee or tenant. An owner or occupant may be liable for an injury to an invitee or licensee where such owner or occupant is represented by an employee acting within the scope of his authority when in charge of the premises. In this case the scope of employment of the plaintiff, George King, as a sales- [21] man with right to enter thereon for purposes of such services, gave him no authority over the premises, such as would classify his wife, under the facts alleged, as an invitee. Assuming Plaintiff, Jessie King, to have had the status of a licensee, the law governing such status, would give Plaintiffs no right of recovery for injuries sus-

tained in accordance with the facts as alleged. *Nevada T. & W. Co. v. Peterson*, 60 Nev. 87, 38 P. (2d) 8; *Babcock & Wilcox v. Nolton*, 58 Nev. 133, 71 Pac. (2d) 1051. In the opinion in the *Babcock* case, *supra*, appears the following:

“In order that a person may have the status of a licensee the owner or person in charge of the premises must have knowledge of his entry or his presence thereon, or of a customary use of the particular portion of the property used for the purpose for which such person is using it.”

It is well settled as a matter of law that Plaintiffs have no right of recovery against the Defendant, owner of the property, upon the facts as alleged, either upon the status of Plaintiff, *Jessie King*, being that of an invitee or a licensee. *Seavy v. I.X.L. Laundry*, 60 Nev. 324, 333, 108 Pac. (2d) 853; *Kneiser v. Belasco Co.*, 133 Pac. 989; *Garthe v. Rupport*, 190 N.E. 643; *Standard Oil Co. v. Heninger*, 196 N.E. 706, 709; *Schmidt v. Bauer*, 80 Cal. 565, 22 Pac. 256, 5 L.R.A. 580; *McNamara v. McLean*, 19 N.E. (2d) 544; *McMullen v. M. and M. Oil Co.*, 290 N.W. 3; 45 C.J. 796, par. 201; 38 Am. Jr. 767 par. 105; *Redfield on Negligence Vol. 2*, par. 705.

In the brief for Plaintiffs appears a map of the ground floor of Defendant's business building. It shows that the entrance to the stairway to the basement and the entrance to the toilet are located near each other on the west side of the building in adjoining spaces, constructed for such respective purposes, the toilet room being in the extreme north-

west corner of the floor space just beyond and adjoining the stairway por- [22] tion. The door to the stairway is shown to open outwards to the south and that of the toilet to open inwards to the west. It is clear from the map that a stranger to the floor space of the building, upon inquiring from one in the main office, of the location of the toilet and that such person turning "toward the open place in the partition, and pointing in that direction said, 'You will find the toilet in there. The door is partly open,' " and thereupon such stranger entering the larger room space to the north of the partition, might probably become confused upon such entrance when but one door space would appear in view, no mention having been made of the presence of two doors or the precise or approximate location of the toilet door.

Conceding such statement to constitute negligence which occasioned the accident and injury, the Plaintiff husband's employment by defendant was not of the character which would make the defendant, in law, liable for such negligence and, hence, subject to a judgment for damages therefor in favor of both husband and wife upon a community property law relationship or in favor of either of them.

It is the conclusion of the Court that the motion to dismiss should be sustained.

It is so ordered.

Dated this 14th day of January, 1944.

FRANK H. NORCROSS

District Judge.

[Endorsed]: Filed Jan. 14, 1944. [23]

[Title of District Court and Cause.]

RECORD OF NOTATION ON DOCKET

Jan. 14, 1944. Judgment of Dismissal entered this day. [24]

Filed April 14th, 1944.

O. E. BENHAM, Clerk,
By O. F. PRATT, Deputy.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT
OF APPEALS

Notice is hereby given that Jessie F. King and George C. King, Plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment of the above-entitled Court dismissing Plaintiffs' action, as per the opinion and decision of said Court reading as follows:

"It is the conclusion of the Court that the motion to dismiss should be sustained. It is so ordered."

followed by notation in the docket of the above-entitled case reading as follows:

"Judgment of dismissal entered this day (January 14, 1944)." [25]

both being entered in this action on the fourteenth day of January, 1944.

CLYDE D. SOUTER

Attorney for Appellants, Jes-
sie F. King and George C.
King

Address: 212-216 Byington Building,
15 West 2nd Street,
Reno, Washoe County, Nevada.

[Endorsed]: Filed April 14, 1944. [26]

[Title of District Court and Cause.]

UNDERTAKING FOR COSTS ON APPEAL

Know All Men by These Presents, that Columbia Casualty Company, a New York Corporation, having an office and place of business in the City, County and State of New York, is held and firmly bound unto the above-named J. H. Yancey in the sum of Two Hundred and Fifty Dollars (\$250.00), to be paid to the said J. H. Yancey for the payment of which, well and truly to be made, it binds itself, its successors and assigns firmly by these presents.

Whereas, on the 14th day of January, 1944, a judgment was entered in the above-entitled proceeding;

And the Appellants, Jessie F. King and George C. King, feeling aggrieved thereby, appeal to the United [27] States Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, the Condition of This Obligation Is Such, that if the aforesaid judgment is affirmed or modified by the appellate court or if the appeal is dismissed, the Appellants, Jessie F. King and George C. King, will pay all costs which may be awarded against them on said appeal.

Dated, Reno, Nevada, this 11th day of April, 1944.

COLUMBIA CASUALTY
COMPANY

[Seal] By J. V. CORICA
Attorney in Fact

Sealed and countersigned at Reno, Washoe County, Nevada, this 11th day of April, 1944.

By J. V. CORICA
Attorney in Fact. [28]

State of Nevada,
County of Washoe—ss.

On this 11th day of April, in the year 1944, before me, Dorothy Gault, a Notary Public in and for said County and State, personally appeared J. V. Corica, known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-Fact of the Columbia Casualty Company, and acknowledged to me that he subscribed the name of the Columbia Casualty Company thereto as principal, and his own name as Attorney-in-Fact.

[Seal] DOROTHY GAULT
Notary Public in and for said
County and State.

My commission expires November 28, 1944.

[Endorsed]: Filed April 14, 1944. [29]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
PLAINTIFFS-APPELLANTS INTEND TO
RELY ON APPEAL

The Plaintiffs-Appellants above named, having filed their notice of appeal from the Judgment in favor of the Defendant-Appellee made and entered in the above-entitled cause on the fourteenth day of January, 1944, hereby make their statement of points upon which they intend to rely on said appeal:—

1. Federal Courts will follow state statutes and decisions in state where Court is sitting in all cases except as provided by United States Constitution or Acts of Congress. The Court erred in failing to follow this principle.

2. Under Conformity Act, 28 U. S. C. A., Section 724, Federal Courts will follow practice authorized by state statutes if there be nothing in statutes that is incongruous with court's organization or fundamental [32] procedure or in conflict with constitutional enactment. The Court erred in failing to approve practice authorized by statutes of the State of Nevada.

3. In an action for personal injuries Federal Courts will follow the determination by the highest appellate court of the state in which the action is tried as determining the degree of care required by the Defendant, unless contrary to Federal law or decisions. The Court erred in refusing to adopt the rule of liability established by the highest ap-

pellate court in the State of Nevada, to-wit, the Nevada Supreme Court.

4. The Court erred in refusing to leave to determination of a jury the degree of negligence of the Defendant where gross negligence would make the Defendant liable under the Court's own opinion and decision.

5. The Court erred in determining that George C. King, as the servant of the Defendant, lacked the necessary authority to invite Plaintiff, Jessie F. King, upon the premises of the Defendant.

6. The Court erred in finding that Plaintiff, Jessie F. King, was not an invitee of the Defendant, J. H. Yancey, in the premises of the Defendant.

7. The Court erred in holding that Plaintiff, Jessie F. King, was not an express invitee of the Defendant, J. H. Yancey.

8. The Court erred in holding that Jessie F. King, under the law of master and servant, taking into consideration the facts that George C. King was employed as a salesman by Defendant, had the right to use the premises at all times, had a key thereto, was actually [33] there to prepare his materials for a trip on behalf of his master, the Defendant, and was being aided in prosecuting that trip by the presence of his wife, was not entitled to rely upon the authority of George C. King to invite her into the premises for the purpose for which she entered, and that Defendant was not liable.

9. The Court erred in holding that even if Plaintiff, Jessie F. King, at the time of her injury, was not engaged in something for the benefit of the Defendant, or which his employee, George C. King, believed was for the benefit of the Defendant, under such circumstances she did not become an invitee by implication, and that Defendant was not liable.

10. The Court erred in holding that even if the Plaintiff, Jessie F. King, was a mere licensee and her presence in the premises was known to George C. King, the Defendant's servant, he having expressly invited her to enter for a particular purpose, the master and his servants using the premises were not under obligation to thereafter exercise reasonable care, and that the conduct of George C. King was not wantonly negligent, and that the Defendant was not liable.

11. The Court erred in holding that even if Plaintiff, Jessie F. King, were considered in the worst possible status, to-wit, as a trespasser, the master, the Defendant, would not be liable for the wanton negligence of his servant perpetrated upon her.

12. The Court erred in arriving at a construction of the term "express invitee" as it is known in the law. [34]

13. The Court erred in refusing to apply the general principle of the law of agency that the principal is bound by the act of his agent which falls within the apparent scope of the authority of the agent, and that the principal will not be per-

mitted to deny the authority of his agent against innocent third parties who have dealt with such agent in good faith.

14. The Court erred in determining the meaning of the apparent authority of a servant to bind his master, as that term is understood in the law.

15. The Court erred in refusing to recognize the doctrine of respondent superior, and that such doctrine is not limited to the acts of the servant done with the express or implied authority of the master, but extends to all acts of the servant done in discharge of the business intrusted to him, even though done in violation of his instructions.

16. The Court erred in refusing to recognize the principle of law that an act is within the "course of employment" if (1) it be something fairly and naturally incident to the business, and if (2) it be done while the servant was engaged upon the master's business and be done, although mistakenly or illadvisedly, with a view to further the master's interest, or from some impulse of emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent, and personal motive on the part of the servant to do the act upon his own account.

17. The Court erred in refusing to be bound by [35] the presumption that exists that, when the servant is engaged in the performance of his master's business, he is acting within the scope of his employment.

18. The Court erred in refusing to enforce the principle of law that the employer is liable if the act complained of was incidental to the acts expressly or impliedly authorized or indirectly contributed to the furtherance of the business of the employer.

19. The Court erred in holding that an invitation is not implied where the entry on the premises of the Defendant is beneficial to the owner.

20. The Court erred in holding that there is no duty to use ordinary care for a licensee on the premises of the Defendant once her presence had become known to the master or his servant.

21. The Court erred in refusing to hold that the affirmative acts of Defendant's employee constituted such wanton conduct as would make Defendant liable for injuries to Plaintiff, Jessie F. King, not only as a licensee but even as a trespasser.

22. The Court erred in refusing to hold that Jessie F. King, under the law of master and servant, in view of the facts set forth in Plaintiffs' complaint, was entitled to rely upon the apparent authority of George C. King, the Defendant's servant, to invite her into Defendant's premises, and that she was therefore an express invitee under the circumstances, and that Defendant was liable.

23. The Court erred in refusing to hold that even if George C. King, Defendant's servant, was acting [36] outside the scope of his authority or implied authority, the said Jessie F. King, according to the express wishes of George C. King, his servant, who believed that his request was for the

benefit of the Defendant, became an invitee by implication, and that Defendant was liable.

24. The Court erred in refusing to hold that even if the Plaintiff, Jessie F. King, should be considered a mere licensee, her presence in the premises was known to George C. King, Defendant's servant, he having expressly invited her to enter, and the master and his servants under such circumstances were required to exercise reasonable care, which was not exercised, and Defendant was therefore liable.

25. That the decision and judgment of the Court are each against law.

26. That the constitutional rights of the Plaintiffs-Appellants under the Constitution of the United States are not recognized and enforced by the judgment of the United States District Court for the District of Nevada, but the result thereof is to deprive the Plaintiffs-Appellants of said rights.

CLYDE D. SOUTER,

Attorney for Plaintiff-Appellants,
Jessie F. King and
George C. King.

Address: 212-216 Byington Building, 15 West 2nd
Street, Reno, Nevada.

Service of a true copy of the foregoing statement
of points on which Plaintiffs-Appellants intend to

rely on appeal is hereby admitted this 26 day of April, 1944.

E. F. LUNSFORD, and

BERT GOLDWATER,

Attorneys for Defendant-Appellee, J. H. Yancey.

[Endorsed]: Filed April 28, 1944. [37]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT

United States of America,
District of Nevada.—ss.

I, O. E. Benham, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of Jessie F. King and George C. King, Plaintiffs, vs. J. H. Yancey, doing business under the firm and/or fictitious name of Yancey Insulation Co., Defendant, said case being No. 302 on the civil docket of said Court.

I further certify that the attached transcript, consisting of 39 typewritten pages numbered from 1 to 39, inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein, together with the endorse-

ments of filing thereon, as set forth in appellants' "Designation of Contents of Record on Appeal", filed in said case and made a part of the transcript attached hereto, as the same appear from the originals [38] of record and on file in my office as such Clerk in Carson City, State and District aforesaid.

And I further certify that the cost of preparing and certifying to said record, amounting to \$8.35, has been paid to me by Clyde D. Souther, Esq., attorney for the appellants herein.

Witness my hand and the seal of said United States District Court this 13th day of May, 1944.

[Seal]

O. E. BENHAM,

Clerk, U. S. District Court. [39]

[Endorsed]: No. 10775. United States Circuit Court of Appeals for the Ninth Circuit. Jessie F. King and George C. King, Appellants, vs. J. H. Yancey, doing business under the firm and/or fictitious name of Yancey Insulation Co., Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Nevada.

Filed May 15, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10775

JESSIE F. KING and GEORGE C. KING,
Appellants,
vs.

J. H. YANCEY, doing business under the firm
and/or fictitious name of YANCEY INSU-
LATION CO.,

Appellee.

Upon Appeal From the District Court of the
United States for the District of Nevada

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To J. H. Yancey, doing business under the firm
and/or fictitious name of Yancey Insulation Co.,
Appellee in the above-entitled cause, and to E. F.
Lunsford, Esquire and Bert Goldwater, Esquire,
attorneys for said Appellee:

Please take notice that, as required by the rules
of this Court, Appellants in the above-entitled
cause do hereby designate the following portions of
the records and proceedings to be contained in the
record on appeal in the above-entitled cause, to-wit:

1. Complete summons in said action.
2. Appellants' complete complaint.
3. Appellee's complete motion to dismiss.
4. Opinion and Decision of Honorable Frank H.

Norcross, Judge of the District Court of the United States, in and for the District of Nevada.

5. Record of notation entered on the records of the United States District Court for the District of Nevada, to-wit: "Judgment of dismissal entered this day."

6. Notice of Appeal.

7. Bond for costs on appeal.

8. This Designation of contents of record on appeal.

9. Statement of points on which Appellants intend to rely on appeal.

CLYDE D. SOUTER,

Attorney for Appellants,
Jessie F. King and George
C. King.

Address: 212-216 Byington Building, 15 West 2nd
Street, Reno, Nevada.

Service of a true copy of the foregoing designation of contents of record on appeal is hereby admitted this 5th day of May, 1944.

E. F. LUNSFORD, and
BERT GOLDWATER,

Attorneys for Appellee, J. H.
Yancey.

[Endorsed]: Filed May 15, 1944. Paul P.
O'Brien, Clerk.

No. 10,775

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

JESSIE F. KING and GEORGE C. KING,
Appellants,

vs.

J. H. YANCEY, doing business under the
firm and/or fictitious name of YANCEY
INSULATION Co.,
Appellee.

PETITION FOR RE-HEARING

E. F. LUNSFORD and
BERT M. GOLDWATER,
First National Bank Bldg.,
Reno, Nevada,

Attorneys for Petitioner-Appellee.

FILED

MAY 5 - 1944

PAUL P. O'BRIEN,

No. 10,775

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

JESSIE F. KING and GEORGE C. KING,
Appellants,

vs.

J. H. YANCEY, doing business under the
firm and/or fictitious name of YANCEY
INSULATION Co.,
Appellee.

PETITION FOR RE-HEARING

TO THE HON. THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT:

Now COMES the above named Appellee, J. H. Yancey, through his attorneys, E. F. LUNSFORD and BERT M. GOLDWATER, and respectfully petitions the above entitled Court for a re-hearing herein, upon the following grounds and for the following reasons:

I.

The Opinion fails to follow the rule of Master and Servant in Nevada under a recent decision.

The opinion holds that as a matter of law, Mr. King was acting within the scope of his employment if he *supposed* the arrangement with Mrs. King would be of mutual advantage to the employer and himself. This holding does not follow the law of Nevada, decided January 29, 1945, in the case of J. C. Penney, Inc., et al v. Gravelle, 155 Pac. (2d) 477 (Advance Sheets), wherein the Court lays down the rule in Nevada to be that what an employee thought was in the scope of employment is not controlling, but rather, the question is, was it within the scope of his employment as shown by the proof? The Court in that recent case also held, contrary to the opinion herein, that where acts are not within any express authority nor within the scope of duty or employment, the principle of respondeat superior does not apply. Said case was not reported until February 9, 1945, two days after the opinion herein, when it appeared in the edition of that day of the Carson City, Nevada, *Chronicle*.

II.

The Opinion joins two separate and distinct invitations into one.

The Court ignores the fact that there are two separate, distinct and special invitations in the case: One, an invitation to accompany Mr. King on the trip, and, two, an invitation to use the premises. The Court fails to apply the rules of law regarding the scope of employment and

the test of mutual advantage to each invitation, but treats the entire conduct as one invitation. The Court has bound together in the opinion two different invitations, each distinct from the other, into one act.

III.

The Opinion erroneously cites SEAVY v. IXL LAUNDRY CO. as authority.

The Court has rested its opinion on the case of Seavy v. IXL Laundry Co., 60 Nev. 324, which is not applicable, as that case required an *entry* by a *customer for the purpose of transacting business* and the use of the toilet which was *commonly* used by *customers*.

IV.

The Opinion erroneously cites NEVADA TRANSFER & WAREHOUSE CO. v. PETERSON as authority.

The Court has further rested its opinion upon Nevada Transfer & Warehouse Co. v. Peterson, 60 Nev. 87, which case is not applicable, for the reason that the plaintiff in that case *actually discharged on the premises*, at the request of the employee *in charge of the premises*, an act which was specifically within the scope of employment of that employee and of mutual benefit to the employee and the defendant therein. Further, the employee in that case gained his authority from his position as watchman and the *emergency* of the occasion.

The Opinion erroneously cites SMITH v. PICKWICK STAGE SYSTEM as authority.

The Court further rested its opinion on the case of Smith v. Pickwick Stages System, 113 Cal. App. 118, 297 Pac. 140, which case is not applicable, as the plaintiff in that case *entered the premises for the purpose of aiding the employee* to discharge his duty to his employer, which duty was within the scope of his employment, and of mutual benefit to the employee and the employer.

VI.

The Opinion, in effect, erroneously holds that the personal and intimate use of the toilet was of benefit to Defendant and within the scope of employment of Mr. King.

The opinion finds as a matter of law that the personal and intimate use of the premises was included in the general invitation to accompany Mr. King on the trip, and that the use of the premises by Mrs. King was "an item, so to speak, on the agenda of the trip." (Court's opinion, page 5). Such language in the opinion erroneously determines that from a general invitation of an employee to have someone accompany him in his automobile, stems the right to use premises out of which the employee works. The original invitation to accompany which may or may not be of mutual advantage to employer and employee, does not under the facts pleaded include the right to use the premises of the employer. The invitation to accompany and the invitation to use the premises are each pleaded separately in the complaint and bear no

relationship when the scope of employment and mutual advantage tests are applied.

VII.

The Opinion enlarges the scope of employment of an outside salesman so as to make the master liable to acts on the premises by third persons.

The opinion fails to note that as to the premises, there was no invitation express or implied by the employer, J. H. Yancey, and the special invitation by Mr. King to use the premises was an afterthought and unconnected with the invitation to accompany. (Tr. 4-5). The special invitation to use the premises, which invitation was first rejected and later accepted, was made by, what the complaint alleges to be, an outside salesman: “*** that *in the regular course of his employment*, he worked out of the business house or place where the business of the Defendant was conducted ***.” (Italics supplied) (Tr. 3). The opinion fails to note that the invitation made by Mr. King could not be within the scope of his employment as alleged in the complaint. The scope of employment as shown by the complaint was to call upon prospective customers outside the premises, and the use of the premises by Mr. King to carry out the requirements of his employment was to “there get certain materials and samples which he in turn intended to exhibit to the prospective customer.” (Tr. 4). The opinion, in effect, enlarges the scope of employment to include the discharge of duties on the *premises*, which are not alleged in the complaint.

VIII.

The Opinion erroneously fails to decide the case on questions of law.

The opinion states: "Concededly, the dismissal was error if, on proof of the facts pleaded a jury might rationally have found that the woman was an invitee." (Court's opinion page 3). The opinion then decided that the dismissal of the district court was error and the question is one for the jury. In the case at bar, the facts are so amply pleaded with such fine and precise detail and explanation, that there remains nothing for a jury to find as a matter of fact. All facts having been admitted by the motion to dismiss, there remains *no finding of fact for the jury*. The facts being clear and admitted, *the question is one of law as to the status of Mrs. King*. The opinion fails to apply the law to the facts, but leaves the question of law to a jury. The facts clearly showing that there was no express or implied authority for Mr. King to invite his wife either in his automobile or on the premises, such invitation being on the face of the pleading beyond the scope of his authority, and not within any duty of his employment, the rule of respondeat superior does not apply, and there is no case stated against the defendant.

IX.

In conclusion, the decision leaves the entire outcome of the case upon the personal opinion of Mr. King, and not upon the facts as alleged, for if Mr. King supposed his conduct was of mutual advantage to himself and the employer, such supposition under the Court's decision, would

be controlling. And further, the opinion conclusively holds that the request to accompany and the invitation to use the toilet was within the scope of employment and of mutual benefit to the employer and the employee in aiding the latter to discharge his duties within the scope of that employment.

WHEREFORE, Appellee respectfully petitions the Court for a re-hearing herein.

E. F. LUNSFORD and

BERT M. GOLDWATER,

Attorneys for Petitioner-Appellee.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition, in my opinion, is well founded and entitled to the favorable consideration of the Court and that it is not interposed for delay.

Dated, Reno, Nevada, March 3, 1945.

BERT M. GOLDWATER,

*One of the Attorneys for
Petitioner-Appellee.*



No. 10,775

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 10

JESSIE F. KING and GEORGE C. KING,
Appellants,

VS.

J. H. YANCEY, doing business under the
firm and/or fictitious name of Yancey
Insulation Co.,
Appellee.

**Upon Appeal from the District Court of the United States
for the District of Nevada.**

BRIEF FOR APPELLANTS.

CLYDE D. SOUTER,
Byington Building, 15 West Second Street, Reno, Nevada,
Attorney for Appellants.

FILED

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PAUL P. O'BRIEN
CLERK



Topical Index

	Page
Statement Concerning Jurisdiction	1
Statement of the Case.....	3
The Questions Involved on This Appeal and the Manner in Which They Are Raised.....	12
Specification of Errors	13
Summary of the Argument.....	14
Argument of the Case and the Law.....	20
Except in matters covered by the Federal Constitution, or by Acts of Congress, the law to be applied in any case is the law of the state, and whether the law of the state shall be declared by its Legislature in a statute or by its highest Court in a decision is not a matter of Federal Concern	20
In considering the granting or refusing of a motion to dis- miss, the Court will take as proven every fact stated in the complaint and essential to recovery, and every infer- ence of fact that can be legitimately drawn therefrom, the Plaintiff being given the benefit of all presumptions..	20
A motion to dismiss in accordance with Rule 12(b) is subject to the general requirement of Rule 7(b). A motion to dismiss for failure to state a claim must specify the vari- ous grounds and objections on which it is based. The scope of the attack is circumscribed by the grounds as- signed	22
The Supreme Court of Nevada, the highest appellate Court in that state, has established that the duty owed by Yancey to the Wife, even if she is considered as a tres- passer, was not to wantonly injure her or fail to exercise due care to prevent her injuries after her presence in a place of danger was discovered.....	22
The Husband had the necessary authority to invite the Wife upon the premises of Yancey, and she was therefore an express invitee	24
To the Wife, as an express invitee, Yancey owed the duty of ordinary care	29

	Page
It is the general rule of law that not only to a mere licensee but even to a trespasser, Yancey owed the duty not only not to wantonly or wilfully injure the Wife but also to use ordinary care to avoid injuring her after her presence was discovered	29
The affirmative acts of Yancey's employee, the Husband, constitute wanton negligence, which would make Yancey liable for injuries not only to a licensee but even to a trespasser	30
The Wife was engaged in something for the benefit of Yancey when she entered the premises of Yancey, and even under such circumstances, without the express invitation of the Husband, she became an invitee by implication	31
Yancey is bound by the act of the Husband as his agent, that act falling within the apparent scope of the authority of the agent. Yancey will not be permitted to deny such authority against the Wife, an innocent third party who dealt with the agent in good faith.....	32
The doctrine of respondeat superior is not limited to the acts of the servant done with the express or implied authority of the master, but extends to all acts of the servant done in discharge of the business intrusted to him, even though done in violation of his instructions.....	36
Appellants are entitled to the presumption that exists that when the servant is engaged upon the performance of his master's business he is acting within the scope of his employment. The Supreme Court of Nevada has enunciated such rule	37
The Nevada Supreme Court has determined as the law of Nevada that the Husband's contributory negligence cannot be imputed to the Wife so as to preclude recovery by the Wife from a third person, Yancey, notwithstanding statutes providing that all property acquired after marriage is community property.....	38
Conclusion	39

Table of Authorities Cited

Cases	Pages
Ada-Konawa Bridge Co. v. Cargo, 21 Pac. (2d) 1.....	19, 32, 35
American Steel and Wire Co. v. Sieraski, 119 Fed. (2d) 709	15, 20
Babcock & Wilcox v. Nolton, 71 Pac. (2d) 1051.....	16, 17, 23, 29
Buckingham v. San Joaquin Cotton Oil Co., 16 Pac. (2d) 807	18, 32
Childers v. Southern Pac. Co., 149 Pac. 307.....	18, 19, 32, 35, 36
Colpoys v. Gates, 118 F. (2d) 16.....	16, 22
Conchin v. El Paso & S. W. R. Co., 108 Pac. 260.....	18, 30
Crosman v. Southern Pac. Co., 194 Pac. (Nev. 1921) 839... ..	16, 17, 18, 19, 22, 29, 30, 31, 37, 39
Ekhardt and Becker Brewing Co., Inc. v. Kavanagh, 112 Fed. (2d) 751	15, 21
Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. 817, 114 A. L. R. 1487.....	15, 20
Federal Life Insurance Co. v. Ettman, 120 Fed. (2d) 837, certiorari denied 314 U. S. 660, 86 L. Ed. 529, 62 S. Ct. 115	15, 20
Fisher v. Burrell, 241 Pac. 40.....	17, 29
Fredrickson & Watson Co. et al. v. Boyd et al., 102 Pac. (2d) 627	19, 38
Gotch v. K. & B. Packing & Provision Co., 25 Pac. (2d) 719	17, 29
Harrison v. Auto Securities Co., 257 Pac. 677.....	19, 32, 33
Healy v. Johnson, 103 N. W. 92.....	19, 32, 35, 36
Hooker v. Routt Realty Co., 76 Pac. (2d) 431.....	17, 29
Horlick's Malted Milk Corp. v. Horlick, 40 F. Supp. 501... ..	15, 21
Kuhn v. Pacific Mutual Life Insurance Co. of California, 37 F. Supp. 102.....	16, 21
Lambert v. Western Pac. R. Co. et al., 26 Pac. (2d) 824... ..	17, 29

	Pages
Leimer v. State Mutual Life Assurance Co. v. Worcester, Mass., 108 Fed. (2d) 302.....	15, 21
Massachusetts Farmers Defense Committee v. United States, 26 F. Supp. 941.....	16, 21
Munsey v. Virginian Ry. Co., 39 F. Supp. 881.....	16, 21
Nevada Transfer & Warehouse Co. v. Peterson, 99 Pac. (2d) (Nev. 1940) 633.....	17, 18, 23, 24, 29, 31
Niagara Motors Corp. v. McGowan, 45 F. Supp. 346.....	15, 21
Securities & Exchange Commission v. Gilbert, 29 F. Supp. 654	16, 21
Shaw's, Inc. v. Wilson-Jones Co., 26 F. Supp. 713, aff'd 105 F. (2d) 331.....	15, 21
Skerl v. Willow Creek Coal Co., 69 Pac. (2d) 502.....	18, 32, 33
Smith v. Pickwick Stages System, 297 Pac. 940.....	18, 27, 31, 32
System Federation Number 59, etc. v. Louisiana and A. Ry. Co., 30 F. Supp. 909, certiorari denied 314 U. S. 656, 86 L. Ed. 526, 62 S. Ct. 108.....	15, 21
Tahir Erk v. Glenn L. Martin Co., 32 F. Supp. 722, rev'd 116 F. (2d) 865.....	16, 21
Vanadium-Alloys Steel Co. v. McKenna, 27 F. Supp. 535...	16, 21
Wilcox v. City of Pittsburgh, 121 F. (2d) 835.....	16, 21
Willner v. Hazen, 71 App. D. C. 373, 111 F. (2d) 511.....	16, 21

Codes and Statutes

Conformity Act, 28 U. S. C. A., Section 724.....	15, 20
Title 28, U. S. C. A., Section 41.....	2
Title 28, U. S. C. A., Section 225.....	2

Texts

Mechem on Agency, p. 1960.....	35, 36
--------------------------------	--------

No. 10,775

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JESSIE F. KING and GEORGE C. KING,

Appellants,

vs.

J. H. YANCEY, doing business under the
firm and/or fictitious name of Yancey
Insulation Co.,

Appellee.

Upon Appeal from the District Court of the United States
for the District of Nevada.

BRIEF FOR APPELLANTS.

STATEMENT CONCERNING JURISDICTION.

The complaint of Appellants herein, filed August 19, 1943, in the United States District Court for the District of Nevada, discloses that the amount in controversy, exclusive of interest and costs, exceeds \$3000.00 (Complaint, par. V, Tr. p. 10); said complaint discloses diversity of citizenship, wherein it alleges that Appellants are citizens and residents of, and domiciled in, the State of Nevada (Complaint, par. I, Tr. p. 2), and that Appellee is a citizen and resident of, and domiciled in, the State of California (Complaint, par. II, p. 2).

Appellee's motion to dismiss admits diversity of citizenship and the amount in controversy, the motion to dismiss under present practice being equivalent to the 'old demurrer. All facts set up in the complaint must be taken as true on the motion to dismiss.

Jurisdiction of the District Court is based on Title 28, U. S. C. A., Sec. 41, which provides:

"The District Courts shall have original jurisdiction as follows:

(1) "... Or, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000.00 and ...

(b) is between citizens of different states ..."

The District Court entered judgment on January 14, 1944, dismissing Appellants' action (Tr. p. 25).

The Appellants, within three months from the entry of said judgment, and on April 14, 1944, filed notice of appeal to the Circuit Court of Appeals (Tr. p. 26).

Thereafter the record on appeal was filed and docketed (Tr. p. 36).

The case comes before this Honorable Court on appeal from the judgment of the District Court dismissing Appellants' action.

Jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit is based on Title 28, U. S. C. A., Sec. 225, which provides:

"The Circuit Courts of Appeals shall have appellate jurisdiction to review by appeal or writ of error final decisions:

“First, in the District Courts, in all cases save where a direct review may be had in the Supreme Court under Section 345 of this Title.”

STATEMENT OF THE CASE.

This appeal is from the judgment of the District Court dismissing Appellants' action and in favor of Appellee.

Appellants are for convenience hereafter referred to as follows: George C. King as “Husband” and Jessie F. King as “Wife”. Appellee, for convenience, is hereafter referred to as “Yancey”.

The Court's judgment reads:

“It is the conclusion of the Court that the motion to dismiss should be sustained.

“It is so ordered.” (Tr. p. 25.)

Following the order of dismissal a notation in the docket of the case was entered by the Clerk of the District Court, reading as follows:

“Judgment of Dismissal entered this day.”
(Tr. p. 26.)

The facts out of which this action arose are:

Jessie F. King and George C. King are wife and husband, and, as above stated, will be hereafter referred to as Wife and Husband.

J. H. Yancey does business under the firm or fictitious name of Yancey Insulation Co., having a place of business located in the City of Reno, Nevada. At that place Yancey carries on a general business of

the insulation of building structures and some related lines of business.

The Husband was regularly employed by Yancey to solicit business for him, and particularly the business of insulating business structures of all kinds and descriptions. In the regular course of the Husband's employment, he worked out of the business house or place where Yancey's business was conducted in the City of Reno, reporting there, and using the building where Yancey's business was conducted at all times when not actually in the field soliciting contracts.

In the regular course of the Husband's employment he had a key to the main entrance of Yancey's business building, and entered said building at all times and at all hours and on all days, for the purpose of facilitating and carrying on his employment under the terms thereof.

On Sunday, July 19, 1942, the Husband, in the regular course of his employment, made preparations to call upon a prospective customer of Yancey's for an insulation job at Bridgeport, California, which call he expected to make on the following day.

The Husband, being an elderly man and in very poor health and subject to falling asleep without warning, requested the Wife to accompany him on his contemplated trip by automobile from Reno, Nevada, to Bridgeport, California, in order that she might be with him and be able to aid and assist him in the event that he should need such aid and assistance on his trip, and particularly, of course, and a

proper inference from the allegations of the complaint, for his protection in the performance of his duties for Yancey should he be affected by falling asleep, as he might possibly do at any time on an automobile trip of such distance.

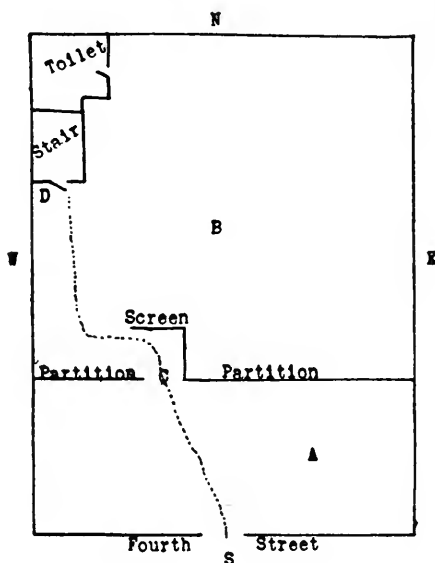
The Wife consented to, and agreed to, accompany the Husband, for these reasons and purposes just described, and in pursuance of said agreement and arrangement and plan, went with the Husband in his automobile on the morning of Sunday, July 19, 1942, to Yancey's place of business, in order that in pursuance of the carrying out by the Husband of the requirements of his employment by Yancey, the Husband could there get certain materials and samples which he in turn intended to exhibit to the prospective customer of Yancey at Bridgeport. The Husband stopped his automobile at the main entrance of Yancey's business place, entered the building, and the Wife remained in the car. But a short time later the Husband came out of the building to the car and stated to the Wife that the trip to the first point of stoppage en route to Bridgeport, California, would be a long trip; that the Husband was planning to go by way of Lake Tahoe; that facilities where the Wife could perform the exigencies of nature would not be easily available for a long period of time; and suggested that the Wife come in the building and use the toilet before starting on the journey.

At first the Wife indicated that it was not at that time necessary, and the Husband returned into the business building of Yancey. But within a few mo-

ments the Wife left the automobile and herself went into Yancey's building and stated to the Husband that she had decided that it would be necessary and advisable to use the toilet facilities in Yancey's building before starting on the journey.

Without repeating the specific allegations of the complaint as to the nature of the building, it is believed that a far better understanding of the locale can be obtained by the Court from the following drawing, which in pictorial form sets up the physical facts of Yancey's building and place of business.

The drawing follows:



Upon the Wife stating that she desired to use the toilet, as she had been requested to do by the Husband, the Husband, who, at that time, with the Wife, was in the front office section of the building and between the street and the partition (area A in draw-

ing), turned toward the open place in the partition (area C), and, pointing in that direction, said: "You will find the toilet in there. The door is partly open".

Thereupon, the Wife went through the opening in the partition, turned to the left to avoid the screen, and then turned to the right. Almost directly before her, at a distance of approximately 20 feet, more or less, appeared a door partly open, hanging in a wall which came out of the main west wall some two feet wider than the door, and then ran northerly to the north wall of the main structure. A reference to the drawing will indicate clearly that obviously said door (indicated by letter "D") was the only door which could be seen by a person entering said rear portion (area B) of Yancey's business building as the Wife, by the physical structure, was required to enter said rear portion (area B) of said building.

The partition running east and west through the business building of Yancey was a high partition, rising to within a few feet of the ceiling, and the screen north of the opening in this partition was a high screen but not quite as high as the partition itself. Yancey had been using the rear room for showing moving pictures of insulation jobs, and the only two windows in the rear portion of said building (area B) were covered with a black paper which shut out all light from entering the back room (area B). The available light in the back room was that which came from the street side of the building, which was almost all glass, there being two large windows on each side of the door, and the door having a glass panel, and

which found its way into the room over the top of the partition.

Although the light was poor, the Wife could see the open door (D) reasonably clearly. She could see that the door was hung on the west side and opened out toward the south. Thereupon the Wife approached that door, took the knob or handle of the door in her left hand, opened the door with her left hand, and as she did so the light from the street windows, coming over the partition, lighted the top portion of the structure into which the door entered. The Wife saw the walls, and relying upon the directions which had been given to her by the Husband, stepped forward into the small structure, believing it to be the toilet. As the Wife stepped forward, her foot did not contact a floor, as anticipated, but the entrance was to a steep flight of stairs, and the sudden stepping down the first step, which was almost immediately behind the door, threw the Wife off balance, and she was catapulted down a long flight of stairs to the cellar of Yancey's building.

There was no warning sign on the door of any character, or any sign at all; there was no rail, chain or other protective device of any kind or character to prevent a person from falling down this stairway, and no platform of any kind, character or description was provided by Yancey either to warn a person of the dangerous character of the stairway, dropping as it did almost immediately from behind the door. There was no light or other device of any kind or character to show the presence of the dangerous

conditions, as above described. Yancey had been put on notice before Sunday, July 19, 1942, by other persons almost falling down this stairway. This stairway, in the condition in which it existed, was dangerous and a menace to persons rightly in said building and using the facilities thereof.

After the Wife entered the rear portion of Yancey's building (area B) it was impossible for her to see that there existed a door entering what was actually the toilet, said toilet being located in the area above the stairway down which the Wife fell, and said toilet being entered by a door on the side wall of the structure in which the stairway was located, which door opened inwardly, toward the west, and therefore could not possibly protrude or be visible to the Wife.

Yancey was negligent and careless in the following manner:

1. In maintaining a dangerous stairway, as heretofore described.

2. In failing to have, keep and maintain any guard rail or other means to prevent a person from falling down said stairs.

3. In failing to maintain a light in said stairway area so that one entering the doorway thereto could see the dangerous and open stairway.

4. In failing to maintain or otherwise to indicate the danger of said stairway.

5. In failing to maintain any sign or other warning to indicate that said door lead to a stairway.

6. In failing to warn the Wife of the existence of said dangerous stairway.

7. In failing to properly instruct the Wife as to the location of the toilet in said premises, and in permitting her, because of the failure of proper instructions, to enter the door to the stairway instead of entering the door to the toilet, which latter door could not be seen by the Wife in entering the rear portion of Yancey's building (area B).

8. In failing to keep said premises of Yancey in a reasonably safe condition so that those invited to enter therein would not be unnecessarily exposed to danger.

9. For maintaining a dangerous stairway without a platform of reasonable width before the first and top step of said stairway.

10. In failing to exercise due and reasonable care for the safety of the Wife, after she was invited to enter the premises of Yancey.

Solely by reason of, and as a direct and proximate result of, the negligence and carelessness of Yancey, the Wife was severely injured, suffering terrible injuries which are more particularly described in paragraph V of the complaint of Appellants filed in the District Court (Tr. pp. 10-11).

The complaint filed in the District Court prays damages in the sum of \$20,000.00 against Yancey, together with costs of suit.

Under the circumstances as they have been above outlined, it would seem that there cannot be the

slightest question that the instructions given to the Wife by the Husband were wantonly negligent. They can only be explained by the Husband's poor health and lack of foresight in directing one who was not as familiar with the premises as he was.

In the opinion and decision of the District Judge we find the following:

“It is clear from the map that a stranger to the floor space of the building, upon inquiring from one in the main office, of the location of the toilet and that such person turning ‘toward the open place in the partition, and pointing in that direction said, “You will find the toilet in there. The door is partly open” ’, and thereupon such stranger entering the larger room space to the north of the partition, might probably become confused upon such entrance when but one door space would appear in view, no mention having been made of the presence of two doors or the precise or approximate location of the toilet door.

“Conceding such statement to constitute negligence which occasioned the accident and injury, the Plaintiff husband's employment by defendant was not of the character which would make the defendant, in law, liable for such negligence and, hence, subject to a judgment for damages therefor in favor of both husband and wife upon a community property law relationship or in favor of either of them.” (Tr. p. 25.)

THE QUESTIONS INVOLVED ON THIS APPEAL AND THE MANNER IN WHICH THEY ARE RAISED ARE AS FOLLOWS:

Appellants' legal position is as follows:

1. Assuming for the moment that the Husband was acting within the scope of his authority, the Wife was not only an invitee but an express invitee, and Yancey would be clearly liable.

2. The Wife under the law of master and servant, taking into consideration the facts that the Husband was a salesman, had a right to use Yancey's premises at all times, had a key thereto, was actually there to prepare his materials for a trip on behalf of the master, and was being aided in prosecuting that trip by the Wife, was entitled to rely upon the authority of the Husband to invite her into the premises for the purpose for which she entered, and Yancey is liable.

3. Even if the Husband was acting outside the scope of his actual authority, the Wife, at the time of her injuries, was engaged in something for the benefit of Yancey, or which his employee, the Husband, believed was for the benefit of Yancey, and under such circumstances the Wife became an invitee by implication, and Yancey is liable.

4. Even if the Wife was a mere licensee, her presence in the premises was known to the Husband, he having expressly invited her to enter for a particular purpose, and the master and his servants, using the premises, were under obligation to thereafter exercise

reasonable care, but the conduct of the Husband was wantonly negligent, and Yancey is liable.

5. Even if the Wife were considered in the worst possible status, to-wit, as a trespasser, which she certainly was not, the master, Yancey, would be liable for the wanton negligence of his servant perpetrated upon her, and would be liable.

Yancey's legal position is as follows:

1. That the Wife was a mere licensee on Yancey's premises, to whom Yancey owed no duty whatever.

2. That the Husband was acting entirely outside the scope of his employment.

The manner in which these contrary legal positions are presented is by the complaint of Appellants filed in the District Court, and by a motion to dismiss by Appellee in that Court, upon the ground that the complaint of Appellants fails to state a claim against Appellee upon which relief can be granted.

(For the respective legal positions of the Husband and Wife and of Yancey, see Appellants' complaint, Tr. pp. 2-12, and Appellee's motion to dismiss, Tr. pp. 15-16.)

SPECIFICATION OF ERRORS.

The errors in the District Court which Appellants rely upon are:

1. The Court erred in failing to follow the established principle of law in the Federal Courts that the

law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest Court in a decision is not a matter of Federal concern.

2. The Court erred in refusing to leave to the determination of a jury the degree of negligence of the Appellee where gross negligence would make the Appellee liable under the Court's own opinion and decision.

3. The Court erred in holding that Appellant, Jessie F. King, was not an express invitee of Appellee, J. H. Yancey.

4. That the District Court erred for all of the reasons set forth in the "Statement of Points on which Appellants Intend to Rely on Appeal" set forth in the transcript, on pages 29-34, both inclusive, reference to which is hereby specifically made as if the same were herein set up *in haec verba*, it being deemed unnecessary to here repeat said points as specifications of error, as they could only unduly enlarge this brief, but each and every of said points is here stated as a specification of error.

SUMMARY OF THE ARGUMENT.

Except in matters covered by the Federal Constitution, or by Acts of Congress, the law to be applied in any case is the law of the state, and whether the law of the state shall be declared by its Legislature in a

statute or by its highest Court in a decision is not a matter of Federal concern.

Erie Railroad Co. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. 817, 114 A. L. R. 1487;

Conformity Act, 28 U. S. C. A., Section 724;

American Steel and Wire Co. v. Sieraski, 119 Fed. (2d) 709.

In considering the granting or refusing of a motion to dismiss, the Court will take as proven every fact stated in the complaint and essential to recovery, and every inference of fact that can be legitimately drawn therefrom, the plaintiff being given the benefit of all presumptions.

Federal Life Insurance Co. v. Ettman, 120 Fed. (2d) 837, certiorari denied 314 U. S. 660, 86 L. Ed. 529, 62 S. Ct. 115;

Ekhardt and Becker Brewing Co., Inc. v. Kavanagh, 112 Fed. (2d) 751;

Leimer v. State Mutual Life Assurance Co. v. Worcester, Mass., 108 Fed. (2d) 302;

System Federation Number 59, etc. v. Louisiana and A. Ry. Co., 30 F. Supp. 909, certiorari denied 314 U. S. 656, 86 L. Ed. 526, 62 S. Ct. 108;

Shaw's, Inc. v. Wilson-Jones Co., 26 F. Supp. 713, aff'd 105 F. (2d) 331;

Niagara Motors Corp. v. McGowan, 45 F. Supp. 346;

Horlick's Malted Milk Corp. v. Horlick, 40 F. Supp. 501;

Munsey v. Virginian Ry. Co., 39 F. Supp. 881;
Tahir Erk v. Glenn L. Martin Co., 32 F. Supp.
 722, rev'd 116 F. (2d) 865;
Securities & Exchange Commission v. Gilbert,
 29 F. Supp. 654;
Vanadium-Alloys Steel Co. v. McKenna, 27 F.
 Supp. 535;
Massachusetts Farmers Defense Committee v.
United States, 26 F. Supp. 941;
Wilcox v. City of Pittsburgh, 121 F. (2d) 835;
Willner v. Hazen, 71 App. D. C. 373, 111 F.
 (2d) 511;
Kuhn v. Pacific Mutual Life Insurance Co. of
California, 37 F. Supp. 102.

A motion to dismiss in accordance with Rule 12(b) is subject to the general requirements of Rule 7(b). A motion to dismiss for failure to state a claim must specify the various grounds and objections on which it is based. The scope of the attack is circumscribed by the grounds assigned.

Colpoys v. Gates, 118 F. (2d) 16.

The Supreme Court of Nevada, the highest appellate court in that state, has established that the duty owed by Yancey to the Wife, even if she is considered as a trespasser, was not to wantonly injure her or fail to exercise due care to prevent her injuries after her presence in a place of danger was discovered.

Crosman v. Southern Pac. Co., 194 Pac. (Nev. 1921) 839;
Babcock & Wilcox Co. v. Nolton, 71 Pac. (2d) 1051;

Nevada Transfer & Warehouse Co. v. Peterson,
99 Pac. (2d) (Nev. 1940) 633.

The Husband had the necessary authority to invite the Wife upon the premises of Yancey, and she was therefore an express invitee.

Nevada Transfer & Warehouse Co. v. Peterson,
99 Pac. (2d) (Nev. 1940) 633.

To the Wife, as an express invitee, Yancey owed the duty of ordinary care.

Nevada Transfer & Warehouse Co. v. Peterson,
99 Pac. (2d) (Nev. 1940) 633.

It is the general rule of law that not only to a mere licensee but even to a trespasser, Yancey owed the duty not only not to wantonly or willfully injure the Wife but also to use ordinary care to avoid injuring her after her presence was discovered.

Babcock & Wilcox Co. v. Nolton, 71 Pac. (2d)
1051;

Nevada Transfer & Warehouse Co. v. Peterson,
99 Pac. (2d) (Nev. 1940) 633;

Crosman v. Southern Pac. Co., 194 Pac. (Nev.
1921) 839;

Lambert v. Western Pac. R. Co. et al., 26 Pac.
(2d) 824;

Fisher v. Burrell, 241 Pac. 40-45;

Gotch v. K. & B. Packing & Provision Co., 25
Pac. (2d) 719;

Hooker v. Routt Realty Co., 76 Pac. (2d) 431.

The affirmative acts of Yancey's employee, the Husband, constitute wanton negligence, which would make

Yancey liable for injuries not only to a licensee but even to a trespasser.

Crosman v. Southern Pac. Co., 194 Pac. (Nev. 1921) 839;

Conchin v. El Paso & S. W. R. Co., 108 Pac. 260.

The Wife was engaged in something for the benefit of Yancey when she entered the premises of Yancey, and even under such circumstances, without the express invitation of the Husband, she became an invitee by implication.

Smith v. Pickwick Stages System, 297 Pac. 940, cited with approval by the Nevada Supreme Court in the case of *Nevada Transfer and Warehouse Co. v. Peterson*;

Buckingham v. San Joaquin Cotton Oil Co., 16 Pac. (2d) 807;

Childers v. Southern Pac. Co., 149 Pac. 307.

Yancey is bound by the act of the Husband as his agent, that act falling within the apparent scope of the authority of the agent. Yancey will not be permitted to deny such authority against the Wife, an innocent third party who dealt with the agent in good faith.

Smith v. Pickwick Stages System, 297 Pac. 940, cited with approval by the Nevada Supreme Court in the case of *Nevada Transfer and Warehouse Co. v. Peterson*;

Skerl v. Willow Creek Coal Co., 69 Pac. (2d) 502;

Harrison v. Auto Securities Co., 257 Pac. 677;
Healy v. Johnson, 103 N. W. 92;
Ada-Konawa Bridge Co. v. Cargo, 21 Pac.
 (2d) 1.

The doctrine of *respondeat superior* is not limited to the acts of the servant done with the express or implied authority of the master, but extends to all acts of the servant done in discharge of the business intrusted to him, even though done in violation of his instructions.

Healy v. Johnson, 103 N. W. 92;
Childers v. Southern Pac. Co., 149 Pac. 307.

Appellants are entitled to the presumption that exists that when the servant is engaged upon the performance of his master's business he is acting within the scope of his employment. The Supreme Court of Nevada has enunciated such rule.

Crosman v. Southern Pac. Co., 194 Pac. (Nev. 1921) 839.

The Nevada Supreme Court has determined as the law of Nevada that the Husband's contributory negligence cannot be imputed to the Wife so as to preclude recovery by the Wife from a third person, Yancey, notwithstanding statutes providing that all property acquired after marriage is community property.

Fredrickson & Watson Co. et al. v. Boyd et al.,
 102 Pac. (2d) 627.

ARGUMENT OF THE CASE AND THE LAW.

EXCEPT IN MATTERS COVERED BY THE FEDERAL CONSTITUTION, OR BY ACTS OF CONGRESS, THE LAW TO BE APPLIED IN ANY CASE IS THE LAW OF THE STATE, AND WHETHER THE LAW OF THE STATE SHALL BE DECLARED BY ITS LEGISLATURE IN A STATUTE OR BY ITS HIGHEST COURT IN A DECISION IS NOT A MATTER OF FEDERAL CONCERN.

Erie Railroad Co. v. Tompkins, 302 U. S. 64,
82 L. Ed. 1188, 58 Sup. Ct. 817, 114 A. L. R.
1487;

Conformity Act, 28 U. S. C. A., Section 724;
American Steel and Wire Co. v. Sieraski, 119
Fed. (2d) 709.

The rule announced by the Supreme Court in *Erie Railroad Co. v. Tompkins*, supra, remaining unchanged, is of course sufficient authority for the above principle.

IN CONSIDERING THE GRANTING OR REFUSING OF A MOTION TO DISMISS, THE COURT WILL TAKE AS PROVEN EVERY FACT STATED IN THE COMPLAINT AND ESSENTIAL TO RECOVERY, AND EVERY INFERENCE OF FACT THAT CAN BE LEGITIMATELY DRAWN THEREFROM, THE PLAINTIFF BEING GIVEN THE BENEFIT OF ALL PRESUMPTIONS.

It should be unnecessary to support this statement by more than the citation of the following authorities, the rule being so universally accepted, the motion to dismiss under Rule 12(b) having taken the place of the demurrer now abolished under the Rules.

Federal Life Insurance Co. v. Ettman, 120 Fed.
(2d) 837, certiorari denied 314 U. S. 660, 86
L. Ed. 529, 62 S. Ct. 115;

- Ekhardt and Becker Brewing Co., Inc. v. Kavanagh*, 112 Fed. (2d) 751;
- Leimer v. State Mutual Life Assurance Co. v. Worcester, Mass.*, 108 Fed. (2d) 302;
- System Federation Number 59, etc. v. Louisiana and A. Ry. Co.*, 30 F. Supp. 909, certiorari denied 314 U. S. 656, 86 L. Ed. 526, 62 S. Ct. 108;
- Shaw's, Inc. v. Wilson-Jones Co.*, 26 F. Supp. 713, aff'd 105 F. (2d) 331;
- Niagara Motors Corp. v. McGowan*, 45 F. Supp. 346;
- Horlick's Malted Milk Corp. v. Horlick*, 40 F. Supp. 501;
- Munsey v. Virginian Ry. Co.*, 39 F. Supp. 881;
- Tahir Erk v. Glenn L. Martin Co.*, 32 F. Supp. 722, rev'd 116 F. (2d) 865;
- Securities & Exchange Commission v. Gilbert*, 29 F. Supp. 654;
- Vanadium-Alloys Steel Co. v. McKenna*, 27 F. Supp. 535;
- Massachusetts Farmers Defense Committee v. United States*, 26 F. Supp. 941;
- Wilcox v. City of Pittsburgh*, 121 F. (2d) 835;
- Willner v. Hazen*, 71 App. D. C. 373, 111 F. (2d) 511;
- Kuhn v. Pacific Mutual Life Insurance Co. of California*, 37 F. Supp. 102.

A MOTION TO DISMISS IN ACCORDANCE WITH RULE 12(b) IS SUBJECT TO THE GENERAL REQUIREMENTS OF RULE 7(b). A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM MUST SPECIFY THE VARIOUS GROUNDS AND OBJECTIONS ON WHICH IT IS BASED. THE SCOPE OF THE ATTACK IS CIRCUMSCRIBED BY THE GROUNDS ASSIGNED.

In the instant case, the Appellee specified no grounds or objections whatever upon which the motion to dismiss was based, the scope of the attack being circumscribed by the grounds assigned, and none having been assigned, the attack fails.

Colpoys v. Gates, 118 F. (2d) 16.

THE SUPREME COURT OF NEVADA, THE HIGHEST APPELLATE COURT IN THAT STATE, HAS ESTABLISHED THAT THE DUTY OWED BY YANCEY TO THE WIFE, EVEN IF SHE IS CONSIDERED AS A TRESPASSER, WAS NOT TO WANTONLY INJURE HER OR FAIL TO EXERCISE DUE CARE TO PREVENT HER INJURIES AFTER HER PRESENCE IN A PLACE OF DANGER WAS DISCOVERED.

This principle was enunciated in the Supreme Court of Nevada in the case of *Crosman v. Southern Pac. Co.*, 194 Pac. (Nev. 1921) 839, which still remains the law in the State of Nevada, there being no decision by the Supreme Court, the Court of highest appellate jurisdiction to the contrary.

In that case, the Court, through Mr. Justice Ducker, said:

“ . . . But, as the duty the respondent owed him as a licensee, under the facts of this case, was no greater than a trespasser—that is, not to wantonly or willfully injure him or fail to exercise due care to prevent his injuries after his presence

in a place of danger was discovered—the difference in the evidence in this respect cannot make the decision of the court on the former appeal less controlling as to the question of proximate cause.”

It is interesting to note that in *Nevada Transfer & Warehouse Co. v. Peterson*, 99 Pac. (2d) (Nev. 1940) 633, twenty years later, counsel for the defendant conceded this to be the rule in Nevada, the Court, through Mr. Justice Ducker in that case referring to this concession in the following language:

“ . . . This contention is grounded in part on the theory that Mrs. Peterson was on the premises as a trespasser, or bare licensee, to whom appellant owed no duty, except to refrain from wilfully or wantonly injuring her.”

The same rule was announced somewhat earlier in the case of *Babcock & Wilcox Co. v. Nolton*, 71 Pac. (2d) 1051, in which the Court said:

“As the jury was entitled to conclude from the evidence that respondent Mrs. Nolton had the status of a licensee on the premises, the duty imposed on appellant was, as stated in the instructions, to refrain from wilfully or wantonly injuring her, or to use care to avoid injuring her after her presence was, or under the circumstances should have been, discovered.”

The Court proceeds:

“ . . . The great weight of authority is to the effect that a person guilty of active negligence, as distinguished from passive negligence, is liable for resulting injury to a licensee.”

Further:

“ . . . ‘If the owner, while the licensee is upon the premises in the exercise of due care, is affirmatively and actively negligent in the management of his property or business, as a result of which the licensee is subjected to increased hazard and danger, the owner will be liable for injuries sustained as the result of such active and affirmative negligence.’ ”

THE HUSBAND HAD THE NECESSARY AUTHORITY TO INVITE THE WIFE UPON THE PREMISES OF YANCEY, AND SHE WAS THEREFORE AN EXPRESS INVITEE.

The Supreme Court of the State of Nevada, the highest Court of appellate jurisdiction, in the case of *Nevada Transfer & Warehouse Co. v. Peterson, et al.*, 99 Pac. (2d) 633, had occasion to consider a case involving facts practically on all fours with the facts of the case at bar.

In that case the plaintiff, after bringing a flashlight to plaintiff's husband, who was defendant's foreman at defendant's warehouse, was requested by defendant's night watchman, who was in charge of the warehouse, to go to warehouse office to attend to a duty for the watchman, which the watchman was unable to perform because of being engaged in other duties.

The Court in that case held the plaintiff was an invitee on the premises with respect to defendant's liability for injury received by plaintiff while departing from the office. The Court held that a night watchman in charge of defendant's warehouse had implied

authority to request plaintiff to go to the warehouse office while a stranger was using a telephone in the office, where the watchman could not remain in the office because of being engaged in performing other duties, and that an invitation is implied where the entry on, or use of, the premises is for a use which is, *or is supposed to be*, beneficial to the owner or occupant.

The Court further held that where the plaintiff as such invitee was requested by the night watchman to go through a darkened receiving room leaving the office, and the watchman knew of an open pit in the receiving room, the watchman was negligent in directing plaintiff to go through receiving room without warning of the pit, even if watchman told plaintiff to be careful, and that the watchman's negligence was the "proximate cause" of injuries received when plaintiff fell into the pit.

The Court further held that the night watchman of the defendant had implied authority to request the plaintiff to leave, as she attempted to do, and that the defendant could not escape liability for the injuries to the plaintiff when she fell in the pit on the theory that the watchman was not acting within the scope of his employment in advising plaintiff as to the way out of the office.

The Court approved a charge of the Court, in that case, reading as follows:

"The Court instructs the jury that if you believe from the evidence in this case that an agent

and employee of the Defendant corporation, while acting within the scope of his employment, invited and requested the plaintiff, Amy J. Peterson, to come upon the premises of the Defendant corporation, and if you further believe from the evidence that the dangerous condition of the premises was unknown to the Plaintiff, Amy J. Peterson, that it was then the duty of the Defendant corporation or its agent and employee to warn the Plaintiff, Amy J. Peterson, of the dangerous condition of the premises, of which condition the Defendant corporation is charged with knowledge, and a failure to so notify the Plaintiff, Amy J. Peterson, of the dangerous condition of the premises would constitute negligence on the part of the Defendant corporation."

The Court approved a second instruction reading as follows:

"The Court instructs the jury that if you believe from the evidence that one of the agents and employees of the Defendant corporation directed the plaintiff, Amy J. Peterson, as to the passageway through which she should leave the premises, that said Plaintiff had the right to assume that the said passageway would be in a reasonably safe condition."

The Court further approved the following instruction:

"The Court instructs the jury that it was the duty of the Defendant corporation to provide reasonably safe passages to and from the places included in its invitation to use the premises; and if you believe from the evidence that the Plain-

tiff, Amy J. Peterson, was invited and requested to use a passageway which was in a dangerous condition, and that the Plaintiff, Amy J. Peterson, did not know of the location of said loading pit, then the invitation and request to Plaintiff, Amy J. Peterson, to use said passageway constituted negligence on the part of the Defendant corporation.”

Further in its opinion the Court said:

“One in charge of premises has authority to do thereon any reasonable act to accomplish the discharge of his duties . . . An additional reason for holding that Ginnochio (the night watchman) had implied authority to invite her to the office may be found in the fact that her going there was for the benefit of appellant. *Smith v. Pickwick Stages System*, 113 Cal. App. 118, 297 P. 940. ‘An invitation is implied where the entry on, or the use of, the premises is for a purpose which is, *or is supposed to be*, beneficial to the owner or occupant.’ ” (Italics supplied.)

In that case the Nevada Supreme Court cites with approval the case of *Smith v. Pickwick Stages System*, 113 Cal. App. 118, 297 Pac. 940. Referring to that case we find that a mere driver of a stage belonging to the Pickwick Stages System invited the plaintiff into a loading room and stage, the Court saying:

“The uncontradicted evidence shows that plaintiff was in the ‘loading room’ and also in the stage at the express invitation of the driver, who had charge of the driving and unloading of the stage, and there is no contention by appellant that

the driver lacked authority from it to grant plaintiff the privilege of entering the 'loading room' and stage. The driver's authority will, therefore, be presumed. Plaintiff's legal status was, therefore, that of an invitee in the 'loading room' of appellant at the time of her injury, and, as such, she was entitled to ordinary care at the hands of the servant of appellant, and an omission in this particular would be binding upon the master for at the time of the infliction of the injury the servant was engaged in accomplishing an object in the line of duties assigned to him by such master. (Citing several cases and texts.)"

So, in the instant case, where the Husband was in charge of Yancey's premises, was there in the course of his employment to prepare his materials for a contemplated trip to call upon a prospective customer, had a key to the office, and regularly used the office for such purpose, he certainly had the same implied authority, if it were necessary to imply it, to invite a person upon the premises, as he did the Wife. But more particularly, inasmuch as the Wife was accompanying him for the benefit of Yancey's business, to make it possible for the Husband to take the long trip contemplated, which it would have been dangerous for him to take in view of his age and physical infirmities, the Wife was not only expressly invited but directed by the Husband to enter Yancey's premises, and for a purpose which the Husband believed would further facilitate the master's (Yancey's) business.

**TO THE WIFE, AS AN EXPRESS INVITEE, YANCEY OWED
THE DUTY OF ORDINARY CARE.**

Nevada Transfer & Warehouse Co. v. Peterson,
99 Pac. (2d) (Nev. 1940) 633.

It must of course be admitted that if we assume that the Wife was an express invitee, as Appellants believe she was, Yancey owed her the duty of ordinary care. The Honorable Judge of the District Court, in his own decision, admitted that the conduct of the Husband was negligence, that there was a lack of ordinary care, and under such circumstances it is evident that the action should not have been dismissed.

**IT IS THE GENERAL RULE OF LAW THAT NOT ONLY TO A
MERE LICENSEE BUT EVEN TO A TRESPASSER, YANCEY
OWED THE DUTY NOT ONLY NOT TO WANTONLY OR
WILLFULLY INJURE THE WIFE BUT ALSO TO USE ORDINARY
CARE TO AVOID INJURING HER AFTER HER PRESENCE
WAS DISCOVERED.**

Babcock & Wilcox Co. v. Nolton (Nev.), supra;
Nevada Transfer & Warehouse Co. v. Peterson
(Nev.), supra;

Crosman v. Southern Pac. Co. (Nev.), supra;
Lambert v. Western Pac. R. Co. et al., 26 Pac.
(2d) 824;

Fisher v. Burrell, 241 Pac. 40-45;

Gotch v. K. & B. Packing & Provision Co., 25
Pac. (2d) 719;

Hooker v. Routt Realty Co., 76 Pac. (2d) 431.

THE AFFIRMATIVE ACTS OF YANCEY'S EMPLOYEE, THE HUSBAND, CONSTITUTE WANTON NEGLIGENCE, WHICH WOULD MAKE YANCEY LIABLE FOR INJURIES NOT ONLY TO A LICENSEE BUT EVEN TO A TRESPASSER.

Crosman v. Southern Pac. Co. (Nev.), *supra*;
Conchin v. El Paso & S. W. R. Co., 108 Pac.
 260.

Unfortunate as it may be that the Husband should have directed the Wife to the toilet as he did, in such a manner that from the physical aspects as shown by the drawing in the statement of facts, she could only as a reasonable person enter the entrance to the dangerous stairway, and when we take into consideration the lighting conditions, with the light coming over the partition and lighting up the upper portion of the stairway entrance so that it looked exactly like the toilet, and there being no chain, warning sign or other means of apprising one of the existence of the stairway, and the stairs dropping precipitously from the door jamb, it is perfectly clear, even as a matter of law, and certainly a question for a jury to determine, that Yancey's employee, acting within the scope of his authority, was not only guilty of ordinary negligence but of wanton negligence.

As was said in the case of *Conchin v. El Paso & S. W. R. Co.*, 108 Pac. 260:

"To constitute 'wantonness' it is not essential that the injury should have been intentional or the probable consequence of the wrongful act; it is sufficient that the act indicates a reckless disregard of the rights of others, a reckless indifference to results, or that the injury is the likely

and not improbable result of the wrongful act. The word 'likely' is here used in the sense of something more than possible and less than probable. 'Wantonly. Done in a licentious spirit, perversely, recklessly, without regard to propriety or the rights of others; careless of consequences, and yet without settled malice.' 2 Bouvier, 1207."

The Supreme Court of Nevada, in defining wanton negligence, in *Crosman v. Southern Pac. Co.*, supra, said:

" . . . while to constitute 'wanton negligence' the party doing the act or failing to act must be conscious of his conduct, and, though having no intent to injure, must be conscious from his knowledge of surrounding circumstances and existing conditions that his conduct will naturally or probably result in injury."

Under the circumstances, therefore, the complaint alleges facts which constitute wanton negligence, which would make Yancey liable, even if the Wife was not only a mere licensee but even if she had actually been a trespasser.

THE WIFE WAS ENGAGED IN SOMETHING FOR THE BENEFIT OF YANCEY WHEN SHE ENTERED THE PREMISES OF YANCEY, AND EVEN UNDER SUCH CIRCUMSTANCES, WITHOUT THE EXPRESS INVITATION OF THE HUSBAND, SHE BECAME AN INVITEE BY IMPLICATION.

Smith v. Pickwick Stages System, supra, cited with approval by the Nevada Supreme Court in the case of *Nevada Transfer and Warehouse Co. v. Peterson*, supra;

Buckingham v. San Joaquin Cotton Oil Co., 16
Pac. (2d) 807;
Childers v. Southern Pac. Co., 149 Pac. 307.

In connection with the foregoing subjects, we have cited a portion of the opinion from *Smith v. Pickwick Stages System*, supra, and referred to this last principle of law. From the facts alleged in the complaint, there can be no question, it would seem, that the Wife entered the premises of Yancey for the purpose of doing something for the benefit of Yancey, to-wit, facilitate the trip which his servant and employee was to take in calling upon a prospective customer of Yancey.

YANCEY IS BOUND BY THE ACT OF THE HUSBAND AS HIS AGENT, THAT ACT FALLING WITHIN THE APPARENT SCOPE OF THE AUTHORITY OF THE AGENT. YANCEY WILL NOT BE PERMITTED TO DENY SUCH AUTHORITY AGAINST THE WIFE, AN INNOCENT THIRD PARTY WHO DEALT WITH THE AGENT IN GOOD FAITH.

Smith v. Pickwick Stages System, supra, cited with approval by the Nevada Supreme Court in the case of *Nevada Transfer and Warehouse Co. v. Peterson*, supra;
Skerl v. Willow Creek Coal Co., 69 Pac. (2d) 502;
Harrison v. Auto Securities Co., 257 Pac. 677;
Healy v. Johnson, 103 N. W. 92;
Ada-Konawa Bridge Co. v. Cargo, 21 Pac. (2d) 1.

In the case of *Skerl v. Willow Creek Coal Co.* (Utah, 1937), supra, at page 506 of 69 Pac. (2d), the Court said:

“It is a general principle of the law of agency, running through all contracts made by agents with third parties, that the principals are bound by the acts of their agents which fall within the apparent scope of the authorities of the agents, and that the principals will not be permitted to deny the authority of their agents against innocent third parties, who have dealt with those agents in good faith. That general principle of agency is universally recognized and applied by the courts, and is laid down by every text-writer who has written upon the subject of agency.”

To the same effect see

Harrison v. Auto Securities Co., 257 Pac. 677.

In the *Skerl* case, supra, the Court was considering the authority of an agent to invite third persons on the master's premises and held that where there was an apparent authority, the master could not be heard to deny the agent's authority to extend the invitation.

Surely in the instant case the Wife had a right to depend upon the apparent authority of the Husband, who entered the premises for business purposes, had a key by which he entered, and was engaged in the master's business.

Later in the *Skerl* case, at page 507, the Court considered what constituted apparent authority in a servant, and said:

“Apparent authority must be ‘apparent’; that is, the act in question which is done by the agent must be such as one which would seem to be within the purview of his actual authority. . . . In other words, the work which the agent is really authorized to do must be such that the act which he does and in regard to which his authority is in question is usual or incidental or of the same nature or reasonably connected with that work or authority which he actually has or he cannot be apparently authorized. Otherwise, the fact that one dealing with another whom he knew was an agent would give that agent apparent authority to do everything an agent might do.

“I doubt whether Jackson, who had charge of entering and removing the coal, had apparent authority to invite people up to the mine while off the premises. When they were on the premises and asked whether they could go in, he, being in charge of inside operations and they knowing that and their request being to go inside, might assume that he had the authority to permit them to enter. Such permission at such time was within his apparent authority. But his previous invitation was material at least to show the occasion for their coming and to show that they knew what Jackson’s job consisted of so that they might presume his authority to admit them. Had they, however, on their own initiative arrived and made inquiries and Howard and Jackson said what they did, and it being shown that they knew what positions those men occupied or the circumstances were such that they could reasonably presume that they had authority to admit them, I think the jury would have been justified in coming to the conclusion that they were permitted to enter the mine.”

In the case of

Healy v. Johnson, 103 N. W. 92,

the Supreme Court of Iowa says:

“ . . . The doctrine of respondeat superior is not limited to the acts of the servant done with the express or implied authority of the master, but extends to all acts of the servant done in discharge of the business intrusted to him, even though done in violation of his instructions.”

In the case of

Childers v. Southern Pac. Co., 149 Pac. 307,

the Court was considering the question as to whether or not an employee was acting within the scope of employment or in pursuance of his own ends, and at page 308, quoting from *Mechem on Agency*, page 1960, said:

“But in general terms it may be said that an act is within the ‘course of employment’ if (1) it be something fairly and naturally incident to the business, and if (2) it be done while the servant was engaged upon the master’s business and be done, although mistakenly or illadvisedly, with a view to further the master’s interest, or from some impulse of emotion which naturally grew out of or was incident to the attempt to perform the master’s business, and did not arise wholly from some external, independent, and personal motive on the part of the servant to do the act upon his own account.”

In the case of

Ada-Konawa Bridge Co. v. Cargo, 21 Pac.

(2d) 1,

at page 7, Note 7, the Court said:

“The presumption exists that, when the servant is in performance of his master’s business, he is acting within the scope of his employment. See *Doherty v. Lord*, 8 Misc. 227, 28 N. Y. S. 720.”

The Court also cites with approval the case of *Childers v. Southern Pac. Co.*, supra.

It would seem that under the facts as alleged in the complaint, there can be no question of the implied authority of the Husband to invite the Wife into the premises, and that the Wife rightfully relied upon that authority, and became an invitee.

THE DOCTRINE OF RESPONDEAT SUPERIOR IS NOT LIMITED TO THE ACTS OF THE SERVANT DONE WITH THE EXPRESS OR IMPLIED AUTHORITY OF THE MASTER, BUT EXTENDS TO ALL ACTS OF THE SERVANT DONE IN DISCHARGE OF THE BUSINESS INTRUSTED TO HIM, EVEN THOUGH DONE IN VIOLATION OF HIS INSTRUCTIONS.

Healy v. Johnson, 103 N. W. 92;

Childers v. Southern Pac. Co., 149 Pac. 307.

In *Childers v. Southern Pac. Co.*, supra, the Court, in considering the question as to whether or not an invitation could be implied because of the mutual interest of the master and the injured plaintiff, quoted at page 308 from *Mechem on Agency*, page 1960, as follows:

“But in general terms it may be said that an act is within the ‘course of employment’ if (1) it be something fairly and naturally incident to the business, and if (2) it be done while the servant

was engaged upon the master's business and be done, although mistakenly or illadvisedly, with a view to further the master's interest, or from some impulse of emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent, and personal motive on the part of the servant to do the act upon his own account."

APPELLANTS ARE ENTITLED TO THE PRESUMPTION THAT EXISTS THAT WHEN THE SERVANT IS ENGAGED UPON THE PERFORMANCE OF HIS MASTER'S BUSINESS HE IS ACTING WITHIN THE SCOPE OF HIS EMPLOYMENT. THE SUPREME COURT OF NEVADA HAS ENUNCIATED SUCH RULE.

In *Crosman v. Southern Pac. Co.*, 194 Pac. (Nev. 1921) 839, the Court reiterates a rule of the Nevada Supreme Court by a citation from a former decision of that Court in this language:

" 'In considering the granting or refusing of a motion for a nonsuit the court must take as proven every fact which the plaintiff's evidence tended to prove, and which was essential to his recovery, and every inference of fact that can be legitimately drawn therefrom, and give the plaintiff the benefit of all legal presumptions arising from the evidence, and interpret the evidence most strongly against the defendant.' *Burch v. Southern Pacific Co.*, 32 Nev. 75, 104 Pac. 225, Ann. Cas. 1912B, 1166."

It is of course fundamental that the presumption exists that when a servant is engaged upon the performance of his master's business he is acting within the scope of his employment.

In the instant case the Appellants are entitled to that presumption in their favor, and if such presumption is indulged in, then the Wife was on the premises of Yancey as an express invitee, Yancey owed her the duty of ordinary care, and there can be no question that that duty was not performed.

THE NEVADA SUPREME COURT HAS DETERMINED AS THE LAW OF NEVADA THAT THE HUSBAND'S CONTRIBUTORY NEGLIGENCE CANNOT BE IMPUTED TO THE WIFE SO AS TO PRECLUDE RECOVERY BY THE WIFE FROM A THIRD PERSON, YANCEY, NOTWITHSTANDING STATUTES PROVIDING THAT ALL PROPERTY ACQUIRED AFTER MARRIAGE IS COMMUNITY PROPERTY.

Fredrickson & Watson Co. et al. v. Boyd et al.,
102 Pac. (2d) 627.

Having in mind that the law to be applied in any case is the law of the state as declared by its highest Court, it is submitted that the District Court should have applied, and probably did apply, this rule of law. It is referred to simply for the purpose of excluding any possibility that the District Court could have based its decision upon a finding of the contributory negligence of the Husband as a matter of law, which in some of the community property states might bar the Wife from recovering, but which is not the case in Nevada.

It should also be pointed out, in further excluding any possibility of that character, that in *Crosman v. Southern Pac. Co.* (Nev.), supra, the Court held that:

“Contributory negligence is no defense to an action for damages for an injury willfully or wantonly inflicted. (Citing textbooks and cases.)”

As stated, this subject is referred to merely for the purpose of excluding the subject of contributory negligence as any basis for the decision of the District Court.

CONCLUSION.

In view of the foregoing it is respectfully submitted that the judgment of the District Court should be reversed and the case remanded, with instructions to require Yancey to plead to Appellants' complaint.

Dated, Reno, Nevada,

July 14, 1944.

Respectfully submitted,

CLYDE D. SOUTER,

Attorney for Appellants.

No. 10,775

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

//

JESSIE F. KING and GEORGE C. KING,
Appellants,

VS.

J. H. YANCEY, doing business under the
firm and/or fictitious name of Yancey
Insulation Co.,
Appellee.

**Upon Appeal from the District Court of the
United States for the District of Nevada.**

BRIEF FOR APPELLEE

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FILED

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PAUL P. O'BRIEN,
CLERK

TOPICAL INDEX

	PAGE
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT OF THE CASE AND THE LAW	6
The Motion to Dismiss Is in Proper Form and, Further, No Objections Having Been Made in the District Court and the Matter Having Been Fully Argued on the Merits, No Objection Can Now Be Made as to the Form of the Motion.....	6
Under Nevada Law the Facts Do Not Render Mrs. King an Invitee as She Was Not Requested to Do Any Act to Aid Her Husband in the Discharge of His Duties for Appellee and Her Presence on the Premises Was of No Mutual Benefit to Herself and Appellee.....	7
The Presence of Mrs. King on Appellee's Premises to Use the Toilet Thereon for Her Own Convenience Gave Her the Status of a Bare Licensee.....	12
No Violation of Duty to a Licensee Is Alleged in the Complaint, in This: (1) The Facts Do Not Show a Wanton or Wilful Act on the Part of Appellee or His Agents, and (2) the Facts Do Not Show a Failure to Exercise Due Care Towards Mrs. King After Her Presence in a Place of Danger Was Discovered.....	17
The Complaint Shows on Its Face That Mrs. King Was Guilty of Contributory Negligence in Walking Into a Dark Opening Which She Presumed to Be the Toilet....	24
The Act of Mr. King in Directing His Wife Was Not Binding on Appellee as It Was Not in the Course of Employment and Did Not Reasonably Tend to Dis- charge the Duties of That Employment.....	25
CONCLUSION	28

TABLE OF AUTHORITIES CITED

Cases	PAGES
Babcock & Wilcox v. Nolton, 71 Pac. (2d) 1051 (Nev.).....	4, 5, 16, 17
Cobb v. First National Bank of Atlanta, 198 S. E. 111....	4, 14
Collins v. Sprague's Benson Pharmacy, 245 N. W. 602....	4, 14
Corbett v. Spanos, 173 Pac. 769.....	6, 25
Crosman v. Southern Pacific Co., 194 Pac. 839 (Nev.)	5, 17, 24
Freeman v. Levy, 5 S. E. (2d) 61.....	4, 15
Garthe v. Ruppert, 190 N. E. 643.....	5, 18
Gotch v. K. & B. Packing Co., 25 Pac. (2d) 719.....	4, 10
Herzog v. Hemphill, 93 Pac. 899.....	4, 5, 15, 22
Keeran v. Spurgeon Merc. Co., 191 N. W. 99.....	4, 6, 11, 27
Kneiser v. Belasco Blackwood Co., 133 Pac. 989.....	5, 18
Knight v. Farmers Gin Co., 252 S. W. 30.....	4, 9
Kruse v. Houston R. R. Co., 253 S. W. 623.....	4, 9
McMullen v. M. & M. Hotel Co., 290 N. W. 3.....	5, 21
McNamara v. MacLean, 19 N. E. (2d) 544.....	4, 13
McNaughton v. Illinois Central R.R., 113 N. W. 844.....	5, 20
Nevada Transfer and Warehouse Co. v. Peterson, 99 Pac. (2d) 633 (Nev.).....	4, 6, 8, 25
Schmidt v. Bauer, 22 Pac. 256.....	4, 5, 16, 23, 24
Seavy v. IXL Laundry, 108 Pac. (2d) 853 (Nev.).....	4, 9
Smith v. Pickwick Stages, 297 Pac. 940.....	4, 11
Standard Oil Co. v. Henninger, 196 N. E. 706.....	5, 19
Thalheimer Bros. v. Casci, 168 S. E. 433.....	5, 22
Trammell v. Fidelity & Casualty Co. of N. Y., 45 Fed. Supp. 366	3, 7

Texts

American Jurisprudence (Vol. 38, para. 104 at p. 765)....	4, 12
American Law Reports (Vol. 89, page 753).....	11
Corpus Juris (Vol. 45, para. 194 at p. 788).....	4, 12
Corpus Juris (Vol. 45, page 814).....	4, 9
Holtzoff and Cozier, Federal Procedural Forms, 147.....	3, 6
Restatement of Agency, Section 242.....	6, 25
Restatement of Torts, Section 330.....	4, 8

No. 10,775

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

JESSIE F. KING and GEORGE C. KING,
Appellants,

vs.

J. H. YANCEY, doing business under the
firm and/or fictitious name of Yancey
Insulation Co.,
Appellee.

**Upon Appeal from the District Court of the
United States for the District of Nevada.**

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

The complaint in this action (Tr. pp. 2-12) contains much evidentiary matter and numerous conclusions of law. The statement of the case in the brief for appellants is a reiteration of the entire complaint. Appellee believes that the following, being a short statement of the ultimate facts as alleged in the complaint, is a better statement of the case for the application of the legal principles involved:

Appellants are husband and wife and the husband, at the time of the injury complained of, was employed as an outside salesman for the appellee. On Sunday, July 19, 1942, the husband drove with his wife to appellee's place of business for the purpose of obtaining samples of materials, which he contemplated using to consummate a sale in another city. The husband asked his wife if she desired to use the toilet at appellee's place of business and she replied that she did not at that time. Shortly thereafter the wife left the automobile, entered appellee's premises, and requested to use the toilet. (Tr. pp. 3-5). The husband directed his wife to the rear of the storeroom, advising her that the door to the toilet was partly open. The wife proceeded to the rear of the storeroom and, instead of opening the toilet door, which faced east and opened inwardly toward the west, she took the knob of the door to a stairway, which opened outwardly to the south. The wife stepped through the door and fell down a stairway, incurring the injuries complained of. (Tr. pp. 6-8).

The appellants contend that the wife, at the time of her injury, was in the status of an invitee, as she was to accompany her husband in his automobile on the trip and to keep him awake while driving. (Tr. p. 4). On the other hand, appellants claim that, even though the complaint does not show the wife to be an invitee, still that there is sufficient allegations to constitute wanton and wilful conduct, which would make appellee liable, even though the wife were a licensee or a trespasser.

It is Appellee's position that the wife, not being a customer or employee and not on the premises to discharge

any duty for Appellee or Appellee's agents, was a bare licensee, if not actually a trespasser. The duty of an owner or occupant of premises to a bare licensee or trespasser is neither to wilfully nor wantonly injure him and to use care to avoid injuring him when his presence is discovered in a place of danger. The complaint does not allege such facts as would constitute a violation by Appellee of that duty. Furthermore, Appellee takes the position that he is not bound by the acts of the husband where they do not appear to be within the scope of employment and do not appear to reasonably discharge any duties of the employment.

SUMMARY OF THE ARGUMENT

The Motion to Dismiss is in the usual form (Tr. pp. 15-16) that "the complaint fails to state a claim against defendant upon which relief can be granted." The Appellants made no objections below to the form of the Motion and it was fully argued on its merits. On this appeal, the Appellants have again fully argued the merits of the Motion in their Brief. They are, therefore, presumed to be clearly aware of the grounds of the motion and no objections may now be heard as to the form of the Motion.

Trammell v. Fidelity & Casualty Co. of N. Y., 45 Fed. Supp. 366;

Holtzoff and Cozier, Federal Procedural Forms, p. 147.

Under Nevada law, the facts do not render Mrs. King an Invitee, as she was not requested to do any act to aid her husband in the discharge of his duties for Appellee and her presence on the premises was of no mutual bene-

fit to herself and Appellee. Mr. King's request to his wife to accompany him was an act to be done outside Appellee's premises and Mrs. King's use of the toilet in no way tended to discharge her husband's request so as to facilitate Appellee's business.

Nevada Transfer and Warehouse Co. v. Peterson,
99 Pac. (2d) 633;

Restatement of Torts, Section 330;

Kruse v. Houston R. R. Co., 253 S. W. 623;

45 Corpus Juris 814;

Knight v. Farmers Gin Co., 252 S. W. 30;

Seavy v. I. X. L. Laundry, 108 Pac. (2d) 853;

Smith v. Pickwick Stages, 297 Pac. 940;

Gotch v. K & B Packing Co., 25 Pac. (2d) 719;

Keeran v. Spurgeon Merc. Co., 191 N. W. 99.

The presence of Mrs. King on Appellee's premises to use the toilet thereon for her own convenience, gave her the status of a bare licensee. Mrs. King was neither a customer nor an employee and had no reason to be on Appellee's premises, except for her own personal desires, absolutely unconnected with and unrelated to Appellee's business.

38 American Jurisprudence 765, para 104;

45 Corpus Juris 788, para. 194;

Babcock & Wilcox v. Nolton, 71 Pac. (2d) 1051;

McNamara v. MacLean, 19 N. E. (2d) 544;

Collins v. Sprague's Benson Pharmacy, 245 N. W. 602;

Cobb v. First National Bank of Atlanta, 198 S. E. 111;

Freeman v. Levy, 5 S. E. (2d) 61;

Herzog v. Hemphill, 93 Pac. 899;

Schmidt v. Bauer, 22 Pac. 256.

No violation of duty to a licensee is alleged in the complaint, in this: (1) The facts do not show a wanton or wilful act on the part of Appellee or his agents, and (2) the facts do not show a failure to exercise due care towards Mrs. King after her presence in a place of danger was discovered. There is no design, purpose or intent to do wrong and reflect injury on Mrs. King and there is no affirmative act alleged to show a failure to exercise care.

Crosman v. Southern Pacific Co., 194 Pac. 839;
Babcock & Wilcox v. Nolton, 71 Pac. (2d) 1051;
Garthe v. Ruppert, 190 N. E. 643;
Kneiser v. Belasco Blackwood Co., 133 Pac. 989;
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McNaughton v. Illinois Central R.R., 113 N. W. 844;
McMullen v. M. & M. Hotel Co., 290 N. W. 3;
Thalheimer Bros. v. Casci, 168 S. E. 433;
Herzog v. Hemphill, 93 Pac. 899;
Schmidt v. Bauer, 22 Pac. 256.

The complaint shows on its face that Mrs. King was guilty of contributory negligence in walking into a dark opening, which she presumed to be the toilet. There being no wanton or wilful conduct alleged in fact, contributory negligence as a defense is available in Nevada. The complaint shows that Mrs. King could see reasonably clearly (Tr. p. 7) but continued walking, thus causing her own fall.

Crosman v. Southern Pacific Co., 194 Pac. 839;
Schmidt v. Bauer, 22 Pac. 256.

The act of Mr. King in directing his wife was not binding on Appellee as it was not in the course of employment and did not reasonably tend to discharge the duties

of that employment. In permitting his wife to go to the toilet and in directing her, Mr. King was acting upon his own and there is nothing in that conduct which is connected with or related to Appellee's business.

Corbett v. Spanos, 173 Pac. 769;

Nevada Transfer and Warehouse Co. v. Peterson,
99 Pac. (2d) 633;

Restatement of Agency, Section 242;

Keeran v. Spurgeon Merc. Co., 191 N. W. 99.

I.

ARGUMENT OF THE CASE AND THE LAW

The Motion to Dismiss is in proper form and, further, no objections having been made in the District Court and the matter having been fully argued on the merits, no objection can now be made as to the form of the Motion.

The Motion to Dismiss states that "the complaint fails to state a claim against defendant upon which relief can be granted" (Tr. pp. 15-16). This is the usual form used in the practice in the District Court and recommended by authors in the field of practice and procedure.

Holtzoff and Cozier, Federal Procedural Forms, p. 147.

Further, the Appellants made no objections in the District Court below and the Motion was argued fully on its merits. Neither did Appellants specify the form of the motion as a point of error upon which they would rely on this appeal. (Tr. pp. 29-34). The Appellants have again argued the merits of the Motion in their Brief and seem

fully advised of the grounds of the Motion. They have therefore, waived objections and the Court may consider the motion to dismiss upon the points argued.

Trammell v. Fidelity & Casualty Co. of N. Y., 45
Fed. Supp. 366.

II.

Under Nevada law the facts do not render Mrs. King an invitee as she was not requested to do any act to aid her husband in the discharge of his duties for Appellee and her presence on the premises was of no mutual benefit to herself and Appellee.

It is alleged in the complaint (Tr. p. 4) that:

“The said George C. King, being an elderly man and in very poor health, and subject to falling asleep without warning, requested his wife, Jessie F. King, one of the Plaintiffs herein, to accompany him on a trip by automobile to Bridgeport, California, in order that she might be with him and be able to aid and assist him in the event that he should need such aid and assistance on said trip.

“That the said Plaintiff, Jessie F. King, consented to and agreed to, accompany said George C. King for the reasons and purposes just mentioned, and in pursuance of said arrangement and plan went with the said George C. King in his automobile on the morning of Sunday, July 19, 1942, to the business place of the Defendant, at 817 East 4th Street, Reno, Nevada, in order that, in pursuance of the carrying out by said George C. King of the requirements of his employment by the Defendant, the said George C. King could there get certain materials and samples which he in turn intended to exhibit to the prospective customer of the Defendant hereinabove mentioned.”

We believe this allegation is an attempt to bring the instant action within^m the rule announced by the Nevada case of *Nevada Transfer and Warehouse Company v. Peterson*, 99 Pac. (2nd) 633.

In that case, a wife who had come into defendant's warehouse to bring her husband a flashlight, and who was injured while leaving the premises, was held to be an invitee where a servant of the defendant in that case, acting within the scope of his employment, requested the wife to go to the warehouse office and remain there while a stranger was using the telephone therein. The Court said:

“One in charge of premises has authority to do thereon any reasonable act to accomplish the discharge of his duties. There was nothing unreasonable in requesting Mrs. Peterson to stay in the office.”

That case is easily distinguished from the present one, as there was nothing requested by Mr. King of his wife to be done on the premises which in any way was within the scope of his employment or was of benefit to the Appellee. The complaint does not alleged as a matter of fact that Mrs. King was to do anything on the premises, but only that she was to accompany her husband “in the event that he should need such aid and assistance.” (Tr. p. 4). It would be farfetched to say that she was in any sense an invitee on the premises where the request for her to accompany her husband was to be fully performed outside and exclusive of the premises of Appellee.

Neither does it avail plaintiff to term herself as an invitee and use the word “invitation.” In *Restatement of Torts*, Section 330, a licensee is defined as follows:

“A licensee is a person who is privileged to enter or remain upon land by virtue of the possessor’s consent, whether given by *invitation* or *permission*.”

(Italics supplied.)

The words “invite” and “permit” are used interchangeably and the true test is whether the presence of the person involved is of mutual interest to himself and to the occupant of the premises. As said in *Kruse v. Houston R.R. Company*, 253 S. W. 623:

“The general test is whether the injured person, at the time of the injury had present business relations with the owner of the premises which would render his presence of mutual aid to both, or whether his presence on the premises was for his own convenience, or on business with others than the owner of the premises. In the absence of some relation which inures to the mutual benefit of the two, or to that of the owners, no invitation can be implied, and the injured person must be regarded as a mere licensee.”

It is said in 45 C. J. 814 that

“Even an express invitation to visit the premises has been held not to give one ~~the~~ the legal status of an invitee where the visit was entirely in his own interests and the inviter had no interest therein.”

In the case of *Knight v. Farmers Gin Co.*, 252 S. W. 30, it was held that plaintiff who was a stockholder in the defendant company and was invited to look over the plant, was a mere licensee even though he had been given an express invitation, where his visit was entirely for his own satisfaction in looking after his own investments.

In *Seavy v. The IXL Laundry*, 108 Pac. (2nd) 853, a Nevada case, there was a recovery for damages suffered

by plaintiff in using a toilet in the laundry. The qualifications of the recovery are important to us in determining the liability in this case. The Court on page 857 states:

“From a consideration of the cited cases we deduct the rule to be that if a *customer* comes upon the premises of a proprietor at either his express or implied invitation, *he has a right to use the toilets on the premises if he receives an invitation*, either express or implied, from the proprietor, employee or the agent of the proprietor, *providing the entry was made by the customer for the purpose of transacting business with the proprietor*; that the entry was made at a reasonable hour, when business transactions are ordinarily conducted; and that the entry was made in an orderly manner and on business that the proprietor was interested in.” (Italics supplied.)

It thus appears that there must be (a) an entry made for the purpose of transacting business with the proprietor; (b) the entry must be made at a reasonable hour when business transactions are ordinarily conducted; and (c) the entry must be made in an orderly manner and on business that the proprietor is interested in.

Applying the rules of the *Seavy Case* to the one at bar, by no stretch of the pleadings can plaintiff bring herself within the rule there set out whereby recovery may be allowed for negligence to an invitee.

In the case of *Gotch v. K & B Packing Co.*, 25 Pac. (2d) 719, cited in Appellants' Brief, it was held that the deceased was a licensee on the defendant's premises and could not recover when she fell into an elevator shaft, while taking lunch to her son, an employee of the defendant. It thus appears that, although technically fur-

nishing defendant's employee's lunch is of some benefit to defendant, still the deceased in that case was held to be a licensee, and the open elevator shaft was a condition of the premises for which the occupant was not liable for injuries if a licensee fell therein. The latter case is a leading annotated case in 89 *A. L. R.* at page 753, followed by numerous decisions to the effect that an occupant is not liable to a person whose presence on the premises is in no way a benefit to the occupant.

In the case of *Keeran v. Spurgeon Merc. Co.*, 191 N. W. 99, the plaintiff returned to defendant's store to recover a coat which he had left on a former visit. The plaintiff was directed by a clerk to a place behind the counter where he might find the coat and, upon walking behind the counter, plaintiff fell through an opening in the floor and was injured. The Court held that as plaintiff was on a personal errand of his own, which was of no benefit to defendant, that plaintiff was a mere licensee, against whom defendant had violated no duty.

In the case of *Smith v. Pickwick Stages*, 297 Pac. 940, cited by Appellants, plaintiff's status was held to be that of an invitee when she was hit by a piece of luggage thrown from the top of a stagecoach by one of defendant's employees in the loading room of defendant's depot. Plaintiff, in that case, had been invited to go into the loading room by one of the defendant's employees to help her mother, who had just arrived on a bus, look for a purse that had been lost.

On page 943 of 297 Pac. the Court said:

“We think that plaintiff’s status was that of an invitee for another reason, to wit: It was the duty of appellant to give its passengers a reasonable opportunity to remove their baggage, and when plaintiff aided in looking for the lost purse, a duty which rested on the stage driver, she was also aiding the appellant; *or, in other words, plaintiff, at the time she was injured, was engaged in a matter which was to the mutual advantage of appellant and its passenger, and was therefore an invitee on the premises.*”

(Italics supplied.)

It is thus apparent from the Nevada cases and those of other jurisdictions that Mrs. King could not have been an invitee and that her presence on the premises, being for her own convenience, gave her a status of less dignity than an invitee.

III.

The presence of Mrs. King on Appellee’s Premises to use the toilet thereon for her own convenience gave her the status of a bare licensee.

The general definition of a licensee is given in 38 *Am. Jur.* 765, paragraph 104, as follows:

“A licensee is broadly defined as a person who enters upon the property of another for his own convenience, pleasure or benefit.”

It is said in 45 *C. J.* 788 at paragraph 194:

“194. B. Licensee—1. Who are Licensees. a. In General. A person is a licensee where his entry or use of the premises is permitted by the owner or person in control thereof, or by operation of law, so that he is not a trespasser, but is without any express or im-

plied invitation. He therefore occupies a position somewhere between that of a trespasser and that of an invitee.

“A license is distinguished from an invitation in that the licensee is on the premises by sufferance only, and not by virtue of any business or contractual relation with, or any enticement, allurements, or inducement to enter held out to him by, the owner or occupant, but merely in his own interest and for his own purposes, benefit, convenience, or pleasure. The terms ‘licensee’ and ‘invitee’ are, however, sometimes confused, for although, in a strict and legal sense, there is a well defined distinction between a licensee and an invitee, the line of demarcation is oftentimes shadowy and indistinct, and in a general sense one who is invited on premises is a licensee. Accordingly the courts have sometimes drawn a distinction between what is termed a ‘mere,’ ‘bare,’ or ‘passive’ license and what is termed a ‘license by invitation,’ or between a so-called ‘licensee’ who enters by invitation or inducement of the owner, or on business with him, or in the discharge of a public or private duty and one who enters voluntarily without any reason. In England a similar distinction has been drawn between a ‘bare licensee’ and what is termed a ‘licensee with an interest.’”

Applying these legal principles to the complaint, it is clear that Mrs. King can, at most, bring herself within the status of a licensee. Many cases involving the permissive use of a toilet for the sole convenience of the person using the toilet have held that such person was a licensee.

In *McNamara v. MacLean*, 19 N. E. (2nd) 544, plaintiff was a customer in defendant's store and requested to use the toilet. The defendant gave permission but told plaintiff that the toilet was in the cellar and for use of employees.

Defendant lifted a hatch and showed plaintiff the way down a narrow stairway and plaintiff in proceeding, lost her balance and fell on the third step. Said the Court:

“Although plaintiff was an invitee in the store, on the evidence she was a bare licensee on the stairway (citing cases). The presence of defendant, and her express permission to use the toilet, gave the plaintiff no higher standing. The case of *Jacobsen v. Simons*, 217 Mass. 194, 104 N. E. 490, where a toilet was maintained for customers and they were invited to use it, is distinguishable. In the absence of wanton or reckless conduct, of which there is no allegation and no evidence, the plaintiff cannot recover.”

In the case of *Collins v. Sprague's Benson Pharmacy*, 245 N. W. 602, where a customer of a drug store requested the use of a toilet and was injured by falling down a stairway near the toilet door and the toilet was one used by employees, the syllabus of the Court states:

Where one, *at his own request*, and solely for his personal pleasure, convenience, or benefit, enters upon the private portion of the business premises of another, with his consent, but without an invitation, he is a bare licensee in such portion of the premises not open to the public, and the occupier of the premises owes no duty to him, save to refrain from inflicting injury upon him.” (Italics supplied.)

In *Cobb v. First Nat. Bank of Atlanta*, 198 S. E. 111, the plaintiff went to the bank to secure a blank promissory note. Plaintiff was directed to a guard who was instructed to take plaintiff to another part of the bank where she might get the note. As the guard passed through a gate, he invited plaintiff to follow, telling her to watch out for her head on the bar above, but failed to warn plaintiff of

a bar below, over which plaintiff tripped and was injured. The Court held plaintiff to be a licensee, sustained a demurrer to the complaint and dismissed the petition.

In *Freeman v. Levy*, 5 S. E. (2nd) 61, where plaintiff entered a store and went to the alteration department to visit a relative of her husband and was injured on the stairs to the alteration department, the Court held plaintiff to be a licensee, defining it thus:

“A licensee is a person who is neither a customer, nor a servant, nor a trespasser, and does not stand in any contractual relation with the owner of the premises, and who is permitted expressly or impliedly to go thereon merely for his own interest, convenience, or gratification.”

In *Herzog v. Hemphill*, 93 Pac. 899, plaintiff's intestate was killed when he fell while visiting the urinal in the rear of a tamale store operated by defendant. The deceased went to defendant's store to make a purchase of tamales and, while there in company of one Miller, the latter expressed a desire to use the urinal. The deceased volunteered to show the way and while on the way fell off an opening at the end of a cul de sac on the stairway. The toilet was used often by patrons of the premises in that case. Said the Court:

“The complaint was demurred to upon the ground that it states no cause of action, and we think the ruling of the trial court in sustaining the demurrer was correct. The complaint does not show that the deceased was more than a mere licensee as to the portion of the premises where the accident occurred. It is a well-settled rule of law that the owner or occupier of land or buildings who, by invitation, express or implied, induces persons to come upon his

premises, is under a duty to exercise ordinary care to render the premises reasonably safe; but he assumes no duty to one who is on his premises by permission only, and as a mere licensee, except that while on the premises no wanton or wilful injury shall be inflicted upon him." * * *

"Mere permission, or a habit, however, of an owner of allowing people to enter and use a certain portion of his premises, is indicative of a license merely, and not of an invitation."

See also *Schmidt v. Bauer*, 22 Pac. 256.

There are few definitions of a licensee as clear as that which is set out in the Nevada case of *Babcock & Wilcox v. Nolton*, 58 Nev. 133, 71 Pac. (2nd) 1051. In that case plaintiff was injured while sitting in her parked automobile on defendant's premises, when that automobile was struck by a truck operated by one of defendant's employees. The Court held that the jury were clearly instructed in the definitions given as follows on page 1053 of 71 Pac. (2d):

"A license is distinguished from an invitation, in that a licensee is on the premises by sufferance only and not by virtue of any business or contractual relation with, or any enticement, allurements, or inducement to enter held out to him by the owner or occupant, but merely his own interest and for his own purposes, benefit, convenience or pleasure."

"In order that a person may have the status of a licensee the owner or person in charge of the premises must have knowledge of his entry or his presence thereon, or of a customary use of the particular portion of the property used for the purpose for which such person is using it."

Sifting out all of the conclusions of Appellants in their

pleading, it appears that the only reason that Mrs. King was on Appellee's premises was to use the toilet for her own convenience. The mere fact that her husband, Appellant George C. King, requested his wife, Jessie F. King, to accompany him, did not require her entrance and use of the premises, nor did her use of the premises facilitate or benefit Appellee's business. Clearly, Jessie F. King is a licensee as defined by our Nevada law applicable to this case.

IV.

No violation of duty to a licensee is alleged in the complaint, in this: (1) The facts do not show a wanton or wilful act on the part of Appellant or his agents, and (2) the facts do not show a failure to exercise due care towards Mrs. King after her presence in a place of danger was discovered.

In Nevada the duty of an owner or occupant of premises to a licensee has been established in several cases. The rule in Nevada as to the duty owed to a licensee is found in *Crosman v. Southern Pacific Co.*, 194 Pac. 839:

“On this trial, under the evidence, he appears as a bare licensee. But, as the duty the respondent owed him as a licensee under the facts of this case, was no greater than a trespasser—that is, not to wantonly or wilfully injure him or fail to exercise due care to prevent his injuries after his presence in a place of danger was discovered—the difference in the evidence in this respect cannot make the decision of the Court on the former appeal less controlling as to the question of proximate cause.”

Again, in the case of *Babcock & Wilcox v. Nolton*, 71 Pac. (2nd) 1051, the Court said:

or to use care
injuring him

“You are instructed that with respect to a licensee, the owner or person in charge of property owes him no duty except to refrain from wilfully or wantonly injuring him after his presence is, or under the circumstances, should have been discovered.”

The facts in the case at bar do not show any wanton or wilful conduct on the part of Appellee or his agents. The condition of the premises is not wanton and wilful conduct. The direction of Mr. King to his wife, although not binding on Appellee, was in itself not wanton and wilful. The husband, who appears as one of the plaintiffs in this case, certainly did not intend or design to injure his wife. Further, no act or conduct of an affirmative nature is alleged, and mere directions, unless given with an intent to injure, are not such affirmative acts as to constitute a violation of duty to a licensee.

In the case of *Garthe v. Ruppert*, 190 N. E. 643, the Court states the duty to a licensee such as the one in the instant case to be as follows:

“Where a person goes upon the premises of another without invitation, but simply as a bare licensee, and the owner of the property passively acquiesces in his coming, if an injury is sustained by reason of a mere defect in the premises, the owner is not liable for negligence, for such person has taken all the risks upon himself.”

In the case of *Kneiser v. Belasco Blackwood Co.*, 133 Pac. 989, where a man was injured when he fell down the stairs on his way to the urinal, the duty of the occupier of the premises in such case was stated:

“If he was a mere licensee, intending by permission only to make use of the toilet located on the premises,

then respondent, under no circumstances which are shown by the evidence, would be required to exercise any care toward him; its obligation only being to refrain from causing him injury through a wilful act."

"* * * The rule is stated in Shearman and Redfield on Negligence, vol. 2, par. 705, as follows: 'A mere passive acquiescence, on the part of the owner or occupant, in the use of real property by others, does not involve him in any liability to them for its unfitness for such use. They take all risks upon themselves. * * *' See, also, Barrows on Negligence, p. 304. A case bearing many points of similarity in its condition of facts is that of Herzog v. Hemphill, 7 Cal. App. 116, 93 Pac. 899, as is also the case of Schmidt v. Bauer, 80 Cal. 565, 22 Pac. 256, 5 L. R. A. 580."

It cannot be said as a matter of law that Appellee was guilty of negligence toward ^{plaintiff} ~~plaintiff~~ Mrs. King. The question of negligence as to a licensee in leaving a cellar door unlocked or partly open, was discussed in the case of *Standard Oil Co. v. Henninger*, 196 N. E. 706, where a person who stopped at a gas station to inquire the way and, after obtaining such information, requested the use of the toilet. The station was so constructed as to have two doors in the rear, both unlocked, one leading to a stairway to the basement of the building, and one being the toilet. (A map of the premises may be found at page 708 of 196 N. E.) The attendant signified assent to plaintiff's request and the plaintiff turned the knob of the cellar door and fell down the stairs. The Court said, on page 709:

"If the appellee was a mere licensee, he took the premises as he found them, and if he was an invitee,

the duty then rested upon the appellant to exercise ordinary care toward the appellee. Under the circumstances, it is not necessary for us to determine whether or not appellee was an invitee or licensee. The closed door to the basement was not a trap or pitfall, and due precaution had been taken by the closing of the door against its improper use. Negligence upon which this action is predicated is that of failing to lock the door. The appellant was not bound to anticipate that people coming upon the premises would assume that every door leading from the main part of the station led to the washroom nor that persons with the ordinary use of their senses would precipitately open doors therefrom and enter without thought as to where they led."

To the same effect is *McNaughton v. Illinois Central R. R.*, 113 N. W. 844 (where there is also a diagram of the premises). In that case plaintiff entered the women's waiting room of a depot and, instead of proceeding ahead to the toilet room where she intended going, plaintiff opened a door to her left, supposing it to be the toilet room, stepped in and fell to the bottom of the basement stairway. Leaving the door unlocked was alleged to be negligent. Plaintiff here was to be a passenger on the railroad and was an invitee to whom even a greater duty was owed than to the present plaintiff. The Court said:

"But it can hardly be said that a closed door to the stairway down to a basement with door knob and catch constitutes a trap or pitfall. Every precaution had been taken, save that of locking it, against its improper use. The heating apparatus was located in the basement, access to which was by this stairway, and leaving the door used by the employees fastened so as to open only upon turning the knob, though unlocked, especially in daylight, when any one upon opening it could plainly see the stairway, was not a

negligent act. The company was not bound to anticipate that passengers will assume that every door from the room opens into a toilet, or that without the ordinary use of their senses they will precipitately open the doors therefrom and enter without thought as to where they lead. From such rooms there are several doors, and no one has the right to act unreservedly upon the belief that any door would be locked unless intended for some particular purpose. The fact that a door is there is a warning that it is the means of exit or of entrance from or to some other apartment, and a way up or down stairs, or to a baggage room, or to a closet; and no one has the right to assume, without knowledge, or its equivalent, the character of the place to which it affords access. The door was maintained in a way convenient for the employees in caring for the furnace, and not dangerous to the public.”

In the case of *McMullen v. M. & M. Hotel Company*, 290 N. W. 3, where a person who entered a drug store to use the telephone and was directed “right over there” by the manager who pointed to the telephone, it was held that that person was a licensee when she sued for injuries suffered by reason of a fall through a trap door near the telephone. Plaintiff in that case contended that, even considering she was a mere licensee, nevertheless, that the manager of the store had directed her to a place without warning her of the existence of the trap door and the danger of falling into it. Plaintiff there alleged that the manager, as a reasonably careful and prudent man, should have known under all the circumstances that the door was open and should have warned plaintiff. The Court said:

“Such contention is without merit. To adopt it would be to disregard the rule as to a mere licensee, and permit recovery on the basis of ordinary negli-

gence. Under our decisions above reviewed, such is not the law. Recovery by a licensee must be based upon wanton or wilful misconduct on the part of the party to be charged. The evidence failed to sustain plaintiff's contention that the defendant hotel company was guilty of any such conduct."

The case of *Thalheimer Bros. v. Casci*, 168 S. E. 433, is helpful. There a customer requested the use of a toilet in a store and was directed to the employees' toilet in the basement. While searching for the toilet, plaintiff entered a basement door and fell down the steps. As to her status, the Court said:

"The case, like most cases, decides itself when the facts have been sifted out. Plaintiff knew that she was being directed to a place where customers were not sent except in emergencies. But whether she knew this or not, she did *not go where she was told to go*, but into a pplace which was not a public part of the storeroom. Manifestly, she was not an invitee if she went where she was not invited, and she was not a licensee if she went where she had no license to go. The utmost that we can say is that she was but a bare licensee—perhaps it would be more accurate to say that she was an unwitting trespasser. To the storeroom generally she was an invitee, but she was by no implication invited to go into that part of it not intended for use by customers, nor did she, as a matter of fact, go there in such capacity." (Italics supplied.)

In the case of *Herzog v. Hemphill*, 93 Pac. 899, where plaintiff's intestate, a customer in defendant's store, was killed when he fell through an opening at the end of a cul de sac on the stairway going to the urinal, it was held that the deceased was a licensee as to that portion of the premises and that, as the urinal was not one generally

used by the public, the defendant could not be liable for injuries received by persons going to and from such place. The Court said:

“There is no allegation that the urinal was designed or maintained for the use of patrons of the store; nor any allegation that it was designed for use or used as a part of the business conducted on the premises.”

In the case of *Schmidt v. Bauer*, 22 Pac. 256, it was held that there was no actionable negligence where a plaintiff on his return from the urinal went through a door where the floor had been taken up and was injured. The plaintiff was held to be an invitee in defendant's saloon, but a licensee as to that of the premises where the urinal was located and at which plaintiff had no business with defendant.

It is apparent from the authorities that a person using a toilet in the status of a licensee has no greater rights than a mere trespasser and in the absence of wanton or wilful conduct or failure to use due care when such person is in a place of danger, no liability attaches to the occupant of the premises for injuries to such bare licensee. A condition of the premises or a direction is not wanton or wilful conduct. Mrs. King was not in a place of danger, but used a doorway and walked into a stairway of her own accord and volition.

V.

The complaint shows on its face that Mrs. King was guilty of contributory negligence in walking into a dark opening which she presumed to be the toilet.

Where there is no wilful or wanton conduct shown the defense of contributory negligence is available to the defendant in Nevada.

Crosman v. Southern Pacific Co., 194 Pac. 839.

As we have heretofore shown, the allegations of the complaint do not constitute wilful or wanton conduct on the part of Appellee or his agents. Therefore, the negligence of Mrs. King herself may be used as a defense and, where it appears on the face of the complaint, it negatives the cause of action. Mrs. King entered the rear of Appellee's premises and although she could see "reasonably clearly (Tr. p. 7) she continued to walk into semi-darkness. Furthermore, she did not ascertain the whereabouts of the light, but opened the cellar door and walked therein.

In *Crosman v. Southern Pacific Co.*, supra, where plaintiff, on a velocipede, was struck by defendant's engine, the Court held plaintiff to be contributorily negligent in proceeding through the dark, although defendant's engine had no lights and gave no warning.

See also *Schmidt v. Bauer*, 22 Pac. 256.

VI.

The act of Mr. King in directing his wife was not binding on Appellee as it was not in the course of employment and did not reasonably tend to discharge the duties of that employment.

Conceding, but not admitting, that Mr. King had the right to invite his wife to accompany him on the trip, still there are no allegations to show any authority to invite Mrs. King on the premises, especially for the purpose of using the toilet. In the case of *Nevada Transfer and Warehouse Co. v. Peterson*, 99 Pac. (2d) 633, upon which Appellants place so much reliance, the plaintiff in that case, while on the premises of the defendant, was requested by another employee to do an act which actually was in discharge of the employee's duties and tended to facilitate and benefit the defendant. No benefit to Yancey can be shown by Mrs. King's use of the toilet.

In the *Restatement of Agency*, Section 242, the liability to an invitee of a servant is stated to be:

“A master is not subject to liability for the conduct of a servant towards a person harmed as the result of accepting or soliciting from the servant an invitation, not binding upon the master, to enter or remain upon the master's premises or vehicle, although the conduct which immediately causes the harm is within the scope of the servant's employment.”

In the case of *Corbett v. Spanos*, 173 Pac. 769, the plaintiff had lunch at defendant's candy and lunch counter and thereafter requested use of the toilet. An employee directed her beyond the partition dividing the store to a toilet in the rear thereof used by employees. On returning

from the toilet to the front of the store, plaintiff fell into an opening caused by a trap door being lifted during the time she was in the toilet but which was closed when she first went through the passageway. The Court held that (1) plaintiff was a mere licensee, (2) that no duty had been violated as to plaintiff by opening the trap door while she had yet to return, and (3) that the direction of the servant in allowing plaintiff to use the toilet, was not binding on the defendant so as to make plaintiff an invitee. On page 770, the Court said:

“While in the complaint in the case at bar it was alleged that the so-called dressing-room was placed by the defendant Spanos at the disposal of his customers and as an inducement to have customers patronize his business, absolutely no evidence in support of this allegation was produced at the trial except the fact that, on the single occasion when plaintiff was injured, she was shown to it by an attendant in response to her query as to whether or not there was a dressing room in the place. It affirmatively appeared in the evidence that there was no sign on the door to the passageway leading to the toilet in question to indicate that there was a dressing room there for the use of customers, and the simple equipment of the room itself, as well as its situation in a poorly lighted passageway, negatives the idea that it was intended for the use of any one other than Spanos’ employees. The attendant who showed plaintiff the way was not called to testify upon the trial, and no authority in her to permit the use of the room by the patrons of the place was shown. In the absence of such showing, no inference of a general invitation or inducement by the proprietor of the store such as is alleged in the complaint can be legitimately drawn from this single instance of its use by permission of his servant. The only duty of a proprietor of a store to a mere licensee, when in that portion of the premises not

customarily used by the public, and to which the licensee is not expressly or impliedly invited, is to avoid doing any wilful or wanton injury to such licensee, and no such injury is shown by the record in the case at bar.”

In the case of *Keeran v. Spurgeon Merc. Co.*, 191 N. W. 99, the plaintiff returned to defendant's store to secure an article which he had left there for safe keeping, and was directed by a clerk behind the counter, and thereupon was injured when he fell down unlighted stairs concealed behind the counter. As to the permission of the clerk to plaintiff, it was said:

“It is insisted, however, that the conversation of the appellant with the clerk in the store was an express invitation to the appellant to go to the place in question to get his coat, and that this conversation rendered him an invitee. Giving to the conversation the broadest construction that could fairly be placed upon it, it was no more than a permission, or license, to the appellant to go to the place in question and get the coat for himself. It was not an invitation to the appellant to do anything whatever in connection with the business of the appellee. Furthermore, in this connection there is no evidence that the lady clerk who told the appellant where she had placed the coat had any authority, express or implied, to invite the appellant to go behind the counter to the place in question.”

There is nothing in the complaint which shows that the directions given by Mr. King to his wife in any way relate to Appellee's business or connects Mrs. King with that business and, furthermore, there is nothing which Mrs. King was requested to do on the premises which discharges any duty of Mr. King to Appellee nor which facilitates, benefits or is of advantage to Appellee.

CONCLUSION

In view of the foregoing, it is believed that the District Court was right in holding that Mrs. King was a licensee and that Appellee had violated no duty to a person in such status, and in further holding that the employment of Mr. King and his conduct in directing Mrs. King was not of such character as would make Appellee liable in law for Mrs. King's injuries. It is respectfully submitted that the judgment of the District Court should be affirmed.

Dated: Reno, Nevada, August 11, 1944.

Respectfully submitted,

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Attorneys for Appellee.

No. 10,775

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

12

JESSIE F. KING and GEORGE C. KING,

Appellants,

VS.

J. H. YANCEY, doing business under the
firm and/or fictitious name of Yancey
Insulation Co.,

Appellee.

**Upon Appeal from the District Court of the United States
for the District of Nevada.**

REPLY BRIEF FOR APPELLANTS.

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FILED

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PAUL P. O'BRIEN,
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Subject Index

	Page
Appellee's statement of the case.....	1
Appellee disagrees with Erie Railroad Co. v. Tompkins, 304 U. S. 64.....	2
Appellee's point that: "Mrs. King was guilty of contribu- tory negligence in walking into a dark opening".....	3
Conclusion	5

Table of Authorities Cited

	Page
Crosman v. Southern Pac. Co., 194 Pac. (Nev. 1921) 839..	3
Nevada Transfer & Warehouse Co. v. Peterson, 99 Pac. (2d) (Nev.) 633	4
Seavy v. I.X.L. Laundry Co., 108 Pac. (2d) (Nev.) 853...	5

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REPLY BRIEF FOR APPELLANTS.

APPELLEE'S STATEMENT OF THE CASE.

The motion to dismiss takes the place of the old demurrer. It was made to the complaint filed in the District Court. No motion was made to strike any part of that complaint. Appellants are entitled to have taken as proved every fact stated in the complaint and essential to recovery, and every inference of fact that can be properly drawn therefrom, and appellants are entitled to the benefit of all presumption.

Appellee's restatement of the case fails to include many of the important facts, excludes all the inferences of fact, and gives the appellants no benefit of any presumption.

**APPELLEE DISAGREES WITH ERIE RAILROAD CO.
v. TOMPKINS, 304 U. S. 64.**

Of course, *Erie Railroad Co. v. Tompkins* is a milestone in the growth and development of American jurisprudence. Appellee is, of course, entitled to disagree with that case, but presently must find himself bound by that decision.

The legal issues involved not being covered by the Federal Constitution or by Acts of Congress, the law to be applied is the law of Nevada as declared by its highest Court.

Applying this doctrine we find that the highest Court in Nevada has established the following principles:

1. The duty owed to a licensee is (a) not to wantonly or willfully injure him, and (b) to exercise due care to prevent his injuries after his presence in a place of danger is discovered.

2. To an express invitee Yancey owed the duty of ordinary care.

3. The wife engaged in something for the benefit of Yancey, even without the express invitation of the husband, became an invitee by implication.

From the facts appearing in the complaint the inferences that may be drawn therefrom, and the presumptions to which appellants are entitled, it would seem very clear that the following results ensue:

1. Appellee, through his servant, was guilty of wanton negligence as that term is construed in *Crosman v. Southern Pac. Co.*, 194 Pac. (Nev. 1921) 839.

2. It certainly cannot be successfully controverted that Yancey's servant knew of the presence of the wife, and by his directions to her, failed to exercise due care. The opinion of the District Court finds the negligence to exist.

3. Where the wife had only one purpose, as it appears from the complaint, and that to aid in the prosecution of Yancey's business by making possible the husband's long and arduous trip for the benefit of Yancey, it would seem equally clear that the wife was an express invitee by implication, even if for the purpose of this thought it were not determined that she was expressly an invitee by the invitation of her husband.

APPELLEE'S POINT THAT: "MRS. KING WAS GUILTY OF CONTRIBUTORY NEGLIGENCE IN WALKING INTO A DARK OPENING."

In the first place such is not the fact. As stated in the complaint there was a considerable amount of light, in that the light coming over the partition lighted the upper portions of the walls of the stairway

giving a complete picture of what appeared to be the walls of the toilet.

In *Nevada Transfer & Warehouse Co. v. Peterson*, 99 Pac. (2d) (Nev.) 633, the Nevada Supreme Court, at page 639, said:

“We think the question of Mrs. Peterson’s negligence was for the jury. As previously stated, she did not proceed in total darkness. The reflection of light in the receiving room was sufficient to enable her to see the floor, but it looked level in front of her. She was corroborated as to this deceptive appearance by her husband, who testified ‘I could see very high up. You could see the floor but you could not possibly see the hole unless you knew it was there.’”

* * * * *

“On the same evidence the jury had the right to find that the danger was not obvious. Also the question as to whether the danger was known to Mrs. Peterson on account of her knowledge of the presence of the unguarded runway, in the receiving room, was for the jury * * *”

Again at page 638, the Nevada Court said:

“Appellant presents cases to the effect that it is contributory negligence, as a matter of law, for a person to proceed in darkness in unfamiliar surroundings, when he is unaware of what the darkness contains. But we think these cases may be distinguished from the instant one. The jury could well have found that Mrs. Peterson did not enter or proceed in a room clothed in total darkness.”

In *Seavy v. I.X.L. Laundry Co.*, 108 Pac. (2d) (Nev.) 853, the Supreme Court of Nevada considered this same subject at page 858:

“The respondent did not proceed in total darkness. The reflection of light in the room was sufficient for him to see the toilet bowl and to proceed to it. (In proceeding he fell into a hole in the floor just as the wife fell into the stairway.) We think, under all of the circumstances here, that the question was one for the trial court to determine, and on the evidence presented the court was justified in finding that the danger was not obvious.” (Interpolation of facts of *Seavy* case supplied.)

CONCLUSION.

It is respectfully submitted that the judgment of the District Court should be reversed and the action remanded.

Dated, Reno, Nevada,
August 21, 1944.

Respectfully submitted,
CLYDE D. SOUTER,
Attorney for Appellants.

No. 10782

United States
Circuit Court of Appeals
For the Ninth Circuit.

13

UNITED STATES OF AMERICA,
Appellant,
vs.

HERMAN ROSENWASSER, an individual doing
business under the firm name and style of
Perfect Garment Company,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

JUL 13 1944

PAUL P. O'BRIEN,
CLERK

No. 10782

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

HERMAN ROSENWASSER, an individual doing
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Central Division



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

Page

Affidavit of Herman Rosenwasser in Support of Motion to Suppress	35
---	----

Appeal:

Assignment of Errors	43
Certificate of Clerk to Transcript of Rec- ord on	48
Citation on	2
Designation of Points on, and Transcript.	49
Notice of Service and Receipt	46
Order Allowing	42
Petition for	40
Praecipe	46
Assignment of Errors	43
Certificate of Clerk to Transcript of Record on Appeal	48
Citation	2
Designation of Points on Appeal and Tran- script	49
Docket Entries	3

Information	5
Minute Orders:	
January 25, 1944—That Information be Filed and Defendant Released on His Own Recognizance	4
March 6, 1944—Hearing	38
Motion to Suppress	32
Names and Addresses of Attorneys	1
Notice of Service and Receipt	46
Order Allowing Appeal	42
Order to Suppress Evidence	39
Petition for Appeal	40
Praecept	46

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

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United States Attorney,

V. P. LUCAS,
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600 U. S. Post Office and Court House
Bldg., Los Angeles 12, Calif.

For Appellee:

BERNARD B. LAVEN,
608 S. Hill St., Los Angeles 14, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and
for the Southern District of California, Central
Division.

No. 16564 Cr.

UNITED STATES OF AMERICA,

Appellant,

v.

HERMAN ROSENWASSER, an individual doing
business under the firm name and style of
PERFECT GARMENT COMPANY,

Appellee.

CITATION

United States of America—ss.

To: Herman Rosenwasser, an individual doing
business under the firm name and style of Perfect
Garment Company.

Greetings:

You are hereby cited and admonished to be and
appear at the United States Circuit Court of Ap-
peals for the Ninth Circuit, at San Francisco, Cali-
fornia, within forty (40) days from the date hereof,
pursuant to an appeal duly allowed and filed in the
office of the Clerk of the District Court of the
United States, for the Southern District of Cali-
fornia, Central Division, wherein the United States
of America is the Appellant and you are the Ap-
pellee, to show cause, if any there be, why the judg-
ment and order made and entered by the District
Court on the 27th day of March, 1944, suppressing
the evidence and ordering the return thereof should

not be corrected, and why speedy justice should not be done to the parties in that [3] behalf.

Witness: The Honorable Peirson M. Hall, United States District Judge for the Southern District of California, Central Division, on the 25th day of April, 1944.

PEIRSON M. HALL,
United States District Judge,
Southern District of Cali-
fornia, Central Division.

Service of the above citation is hereby acknowl-
edged this 2nd day of May, 1944.

BERNARD B. LAVEN
Attorney for Appellee.

[Endorsed]: Filed May 3, 1944. [4]

[Title of District Court and Cause.]

DOCKET ENTRIES

1-25-44 Ent. ord. filing & fld. Info. & releasg. deft
O.R.

* * *

3- 3-44 Fld. mot. to quash inform., demurrer, mot.
to suppress & affid. of deft. in supp. of mot.
to suppress.

* * *

3- 6-44 Ent. fur procs. hrg. on deft's mot. to sup-
press & ent. ord. grantg. & ent. fur. ord.
that hrg. on deft's. plea of former jeop-
ardy, deft's mot. to quash ea. & every et. &

demurrer be cont. to 3-27-44 at 10 A.M. &
cont. to said date for entry of plea. [5]

* * *

At a stated term, to-wit: The September Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 25th day of January in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable J. F. T. O'Connor, District Judge.

[Title of Cause.]

No. 16,564—Crim.

ORDER THAT INFORMATION BE FILED
AND DEFENDANT RELEASED ON HIS
OWN RECOGNIZANCE

On motion of Ray H. Kinnison, Esq., Assistant U. S. Attorney, appearing for the Government, who presents an Information to the Court in this cause, it is ordered that the said Information be filed and that the defendant, Herman Rosenwasser, doing business under the firm name and style of Perfect Garment Co., be, and he hereby is, released on his own recognizance. [6]

[Title of District Court and Cause.]

INFORMATION

Violations of 29 U.S.C.A. Sections 15(a)(1), 15(a)(2) and 15(a)(5), Fair Labor Standards Act of 1938.

Count One

Charles H. Carr, United States Attorney in and for the Southern District of California, who for the United States in this behalf prosecutes in his own proper person, and with leave of court first had and obtained, gives the court here to understand and to be informed as follows, to-wit:

1. That Herman Rosenwasser of the City of Los Angeles, Los Angeles County, California, within the Central Division of the Southern District of California, the defendant herein, is, and at all times hereinafter referred to, was the sole owner and operator of a place of business and manufacturing plant which he operates under the fictitious firm name of Perfect Garment Company;

2. That the defendant Herman Rosenwasser is, and at all times hereinafter referred to, was engaged under the fictitious firm name and style of Perfect Garment Company in the business of producing men's and women's coats and suits and Army and Navy Officers' uniforms; that in the course of said business he procures and obtains raw materials, manufactures and produces therefrom men's and women's coats and suits and Army and Navy Officers' uniforms and sells and ships such garments;

3. That the defendant Herman Rosenwasser is, and at all times hereinafter referred to, was in charge of the aforesaid manufacture and production operations conducted by him and engaged in the supervision and [7] direction of all employees employed by him;

4. That the defendant Herman Rosenwasser is and at all times hereinafter referred to was, an employer within the meaning of and subject to the provisions of the Fair Labor Standards Act of 1938; that the men's and women's coats and suits and Army and Navy officers' uniforms manufactured and produced by the defendant Herman Rosenwasser were, at all times hereinafter referred to, manufactured and produced by him with the intent on the part of the said defendant Herman Rosenwasser that all or some part of said goods would be sold, shipped, transported and delivered to customers at points outside the State of California; that a substantial portion of the said coats and suits and uniforms so produced were sold, shipped, transported and delivered to customers at points outside the State of California; that in producing the said coats, suits and uniforms the defendant Herman Rosenwasser produced goods for interstate commerce within the meaning of the Fair Labor Standards Act of 1938;

5. That the defendant Herman Rosenwasser, at all times hereinafter referred to, employed and permitted and suffered to work in the production of goods, to-wit: coats, suits and uniforms, as aforesaid, numerous persons who were employees within

the meaning of the Fair Labor Standards Act of 1938;

6. That a large proportion of the said employees was engaged, at all times hereinafter referred to, in the production of goods, to-wit: coats, suits and uniforms, for interstate commerce within the meaning of the Fair Labor Standards Act of 1938;

7. That on October 21, 1938, the duly appointed Administrator of the Wage and Hour Division of the United States Department of Labor, pursuant to the authority vested in him by Section 11(c) of the Fair Labor Standards Act of 1938, duly issued regulations on records to be kept by employers subject to any provision of the Fair Labor Standards Act of 1938; that the said regulations were published in the Federal Register of October 22, 1938, and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516;

8. That the defendant Herman Rosenwasser employed, within the [8] meaning of the Fair Labor Standards Act of 1938, one Grace Walton during the workweek beginning April 5, 1942, and ending April 11, 1942, in the production of goods, to-wit: men's and women's coats and suits and Army and Navy Officers' uniforms, for interstate commerce, and the defendant Herman Rosenwasser on or about April 11, 1942, in the City of Los Angeles, Los Angeles County, within the Central Division of the Southern District of California, within the jurisdiction of this court, did unlawfully and wilfully make and cause to be made a record required by and kept pursuant to the provisions of Section

11(c) of the Fair Labor Standards Act of 1938, and the regulations duly issued thereunder, hereinabove referred to and known as Title 29, Chapter V, Code of Federal Regulations, Part 516, then and there knowing such record to be false in a material respect; that is to say, the defendant Herman Rosenwasser did, on or about April 11, 1942, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, within the jurisdiction of this court, unlawfully and wilfully make and cause to be made on a time sheet of said defendant, Herman Rosenwasser, said time sheet bearing the name "Grace Walton" and the date "Apr-11-42", the following entries in a column entitled "Reg. Hrs", to-wit: opposite the word "Monday" "8"; opposite "Tuesday" "8"; opposite "Wednesday" "8"; opposite "Thursday" "8"; opposite "Friday" "8"; and opposite "total" "40"; which said entries purport to show and in substance and effect declare that the hours worked by the said Grace Walton during the workweek commencing April 5, 1942, and ending April 11, 1942, were 40, whereas in truth and in fact, as the defendant, Herman Rosenwasser, then and there well knew, the hours worked by said Grace Walton during said workweek were not 40 and in fact were 49;

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.) [9]

Count Two

And the said United States Attorney, in the manner and form aforesaid, further informs the court that:

1. Each and every allegation contained in paragraphs 1 to 7 inclusive of the First Count of this Information is hereby referred to and made a part of this count and incorporated by reference with the same force and effect as if here set forth in full;

2. That the defendant, Herman Rosenwasser, employed within the meaning of the Fair Labor Standards Act of 1938, one Nadya Galloway, during the workweek beginning March 29, 1942, and ending April 4, 1942, in the production of goods, to-wit: men's and women's coats and suits and Army and Navy officers' uniforms, for interstate commerce, and the defendant, Herman Rosenwasser, on or about April 4, 1942, in the City of Los Angeles, Los Angeles County, within the Central Division of the Southern District of California, within the jurisdiction of this Court, did unlawfully and wilfully make and cause to be made a record required by and kept pursuant to the provisions of Section 11(c) of the Fair Labor Standards Act of 1938, and the regulations duly issued thereunder, hereinabove referred to and known as Title 29, Chapter V, Code of Federal Regulations, Part 516, then and there knowing such record to be false in a material respect; that is to say, the defendant, Herman Rosenwasser, did, on or about April 4, 1942, in the City of Los Angeles, County of Los Angeles, within the Central Division of the

Southern District of California, within the jurisdiction of this Court, unlawfully and wilfully make and cause to be made on a time sheet of said defendant, Herman Rosenwasser, said time sheet bearing the name "Nadya Calloway" and the date "April 4, 1942," the following entries, to-wit: opposite "Monday"; after the word "In" "8", after the word "Out" "4", in a column entitled "Reg. Hrs." "7"; opposite "Tuesday"; after the word "In" "8", after the word "Out" "4", in the said column "7"; opposite "Wednesday"; after the word "In" "8", after the word "Out" "4", in the said column "7"; opposite "Thursday"; after the word "In" "8", after the word "Out" "4", in said column "7"; opposite "Friday"; after the word "in" "8", after the word "Out" "4", in said column "7"; opposite "Satur- [10] day"; after the word "In" "8", after the word "Out" "12", in said column "4"; and after the word "Total" "39"; which said entries purport to show and in substance and effect declare that the hours worked by said Nadya Calloway during the workweek commencing March 29, 1942, and ending April 4, 1942, were 39, whereas in truth and in fact, as defendant, Herman Rosenwasser, then and there well knew, the hours worked by said Nadya Calloway during said workweek were not 39 and in fact were 45;

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.) [11]

Count III

And the said United States Attorney, in the manner and form aforesaid, further informs the Court that:

1. Each and every allegation contained in paragraphs 1 to 7 inclusive of the First Count of this Information is hereby referred to and made a part of this count and incorporated by reference with the same force and effect as if here set forth in full:

2. That the defendant, Herman Rosenwasser, employed within the meaning of the Fair Labor Standards Act of 1938, one Lukena Patella, during the workweek beginning April 12, 1942, and ending April 18, 1942, in the production of goods, to-wit: men's and women's coats and suits and Army and Navy officers' uniforms, for interstate commerce, and that the defendant, Herman Rosenwasser, on or about April 17, 1942, in the City of Los Angeles, Los Angeles County, within the Central Division of the Southern District of California, within the jurisdiction of this Court, did unlawfully and wilfully make and cause to be made a record required by and kept pursuant to the provisions of Section 11(c) of the Fair Labor Standards Act of 1938, and the regulations duly issued thereunder, hereinabove referred to and known as Title 29, Chapter V, Code of Federal Regulations, Part 516, then and there knowing such record to be false in a material respect; that is to say, the defendant, Herman Rosenwasser, did, on or about April 17, 1942, in the City of Los Angeles, County of Los Angeles, within

the Central Division of the Southern District of California, within the jurisdiction of this Court, unlawfully and wilfully make and cause to be made on a time sheet of said defendant, Herman Rosenwasser, said sheet bearing the name "Lukena Patella" and the date "April 17, 1942," the following entries, to-wit: opposite "Monday", after the word "In" "8:00", after the word "Out" "5:00", in a column entitled "Reg. Hrs." "8"; opposite "Tuesday": after the word "In" "8.00", after the word "Out" "5:00", and in said column "8"; opposite "Wednesday": after the word "In" "8:00", after the word "Out" "4:30", in said column "8"; opposite "Thursday": after the word "In" "8:00", after the word "Out" "5:30", in said column "8"; opposite "Friday": after the word "In" "8:00", after the word "Out" [12] "5:00", in said column "8"; and opposite the word "Total" "40": which said entries purport to show and in substance and effect declare that the hours worked by said Lukena Patella during the workweek commencing April 12, 1942, and ending April 18, 1942, were 40, whereas in truth and in fact, as defendant, Herman Rosenwasser then and there well knew the hours worked by said Lukena Patella during the said workweek were not 40 and in fact were 42½;

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.) [13]

Count Four

And the said United States Attorney, in the manner and form aforesaid, further informs the Court: that:

1. Each and every allegation contained in paragraphs 1 to 7 inclusive of the First Count of this Information is hereby referred to and made a part of this count and incorporated by reference with the same force and effect as if here set forth in full:

2. That the defendant, Herman Rosenwasser, employed within the meaning of the Fair Labor Standards Act of 1938, one Jennie Green, during the workweek beginning September 13, 1942, and ending September 19, 1942, in the production of goods, to-wit: men's and women's coats and suits and Army and Navy Officers' uniforms, for interstate commerce, and that the defendant, Herman Rosenwasser, on or about September 18, 1942, in the City of Los Angeles, Los Angeles County, within the Central Division of the Southern District of California, within the jurisdiction of this Court, did unlawfully and wilfully make and cause to be made a record required by and kept pursuant to the provisions of Section 11(c) of the Fair Labor Standards Act of 1938, and the regulations duly issued thereunder, hereinabove referred to and known as Title 29, Chapter V, Code of Federal Regulations, Part 516, then and there knowing such record to be false in a material respect; that is to say, the defendant, Herman Rosenwasser, did, on or about September 18, 1942, in the City of Los

Angeles, County of Los Angeles, within the Central Division of the Southern District of California, within the jurisdiction of this Court, unlawfully and wilfully make and cause to be made on a time sheet of the said defendant, Herman Rosenwasser, said sheet bearing the name "Jennie Green" and the date "9/18/42", the following entries, to-wit: opposite "Monday"; after the word "In" "8", after the word "Out" "4:30"; opposite "Tuesday": after the word "In" "8", after the word "Out" "4:30": opposite "Wednesday": after the word "In"; "8", after the word "Out" "4:30"; opposite "Thursday": after the word "In" "8", after the word "Out" "4:30"; opposite "Friday": after the word "In" "8", after the word "Out" "4:30"; which said entries purport to show and in substance and [14] effect declare that said Jennie Green, during the workweek commencing September 13, 1942, and ending September 19, 1942, did not work on Saturday, September 19, 1942, whereas in truth and in fact as defendant, Herman Rosenwasser, then and there well knew, said Jennie Green did work on Saturday, September 19, 1943, and that the total hours worked by said Jennie Green in said workweek were in excess of those recorded by the defendant as having been worked by said Jennie Green.

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.) [15]

Count V

And the said United States Attorney, in the manner and form aforesaid, further informs the Court that:

1. Each and every allegation contained in paragraphs 1 to 7, inclusive, of the First Count of this Information is hereby referred to and made a part of this count and incorporated by reference with the same force and effect as if here set forth in full.

2. That the defendant, Herman Rosenwasser, employed within the meaning of the Fair Labor Standards Act of 1938, one Joseph Krayner during the workweek beginning October 4, 1942, and ending October 10, 1942, in the production of goods, to-wit: men's and women's coats and suits and Army and Navy officers' uniforms, for interstate commerce, and that the defendant, Herman Rosenwasser, on or about October 9, 1942, in the City of Los Angeles, Los Angeles County, within the Central Division of the Southern District of California, within the jurisdiction of this Court, did unlawfully and wilfully make and cause to be made a record required by and kept pursuant to the provisions of Sec. 11(c) of the Fair Labor Standards Act of 1938, and the regulations duly issued thereunder, hereinabove referred to and known as Title 29, Chapter V, Code of Federal Regulations, Part 516, then and there knowing such record to be false in a material respect; that is to say, the defendant, Herman Rosenwasser, did, on or about October 9, 1942, in the City of Los Angeles, County of Los Angeles,

within the Central Division of the Southern District of California, within the jurisdiction of this Court, unlawfully and wilfully make and cause to be made on a time sheet of said defendant, Herman Rosenwasser, said time sheet bearing the name "Joseph Krayner" and the date "Oct. 9" 1942, the following entries, to-wit: opposite "Monday": after "In" "8", after the word "Out" "4:30", in a column entitled "Reg. Hrs." "8"; opposite "Tuesday": after "In" "8", after the word "Out" "5", in said column "8"; opposite "Wednesday": after "In" "8", after the word "Out" "4:30", in said column "8"; opposite "Thursday": after "In" "8", after the word "Out" "4:30", in said column "8"; opposite "Friday": after "In" "8"; after the word "Out" "5:30", in said column "8"; and after the word "Total" [16] "40"; which said entries purport to show and in substance and effect declare that the hours worked by said Joseph Krayner during said workweek commencing October 4, 1942, and ending October 10, 1942, were 40, whereas in truth and in fact, as defendant, Herman Rosenwasser, then and there well know, the hours worked by the said Joseph Krayner were not 40 and in fact were 41 1/2:

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.) [17]

Count VI

And the said United States Attorney, in the manner and form aforesaid, further informs the Court that:

1. Each and every allegation contained in paragraphs 1 to 6 inclusive of the First Count of this Information is hereby referred to and made a part of this count and incorporated by reference with the same force and effect as if here set forth in full:

2. That on May 15, 1940, the duly appointed Administrator of the Wage and Hour Division of the United States Department of Labor, pursuant to and in accordance with the authority conferred upon him by Sections 5 and 8 of the Fair Labor Standards Act of 1938, duly issued a Wage Order for the cloaks, suits, and separate skirts division of the apparel industry; that the said Wage Order was published in the Federal Register on May 17, 1940, and is known as Title 29, Chapter V, Code of Federal Regulations, Part 566; that the said Wage Order became effective on July 15, 1940, and has been at all times since said date, and is now, in full force and effect.

3. That the said Wage Order requires every employer to pay to each of his employees who is engaged in the production for interstate commerce, within the meaning of the Fair Labor Standards Act of 1938, of women's coats, suits and skirts, wages at a rate not less than forty cents (40c) an hour, from and after July 15, 1940:

4. That on May 15, 1940, the duly appointed Administrator of the Wage and Hour Division of the United States Department of Labor, pursuant to and in accordance with the authority conferred upon him by Sections 5 and 8 of the Fair Labor Standards Act of 1938, duly issued a Wage Order for the men's and boys' clothing division of the apparel industry; that the said Wage Order was published in the Federal Register on May 17, 1940, and is known as Title 29, Chapter V, Code of Federal Regulations, Part 559; that the said Wage Order became effective on July 15, 1940, and has been at all times since said date, and is now in full force and effect;

5. That the said Wage Order requires every employer to pay to each [18] of his employees who is engaged in the production for interstate commerce, within the meaning of the Fair Labor Standards Act of 1938, of men's and women's coats and suits and Army and Navy Officers' uniforms, wages at a rate not less than forty cents (40c) an hour, from and after July 15, 1940;

6. That the defendant, Herman Rosenwasser, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California and within the jurisdiction of this Court, did, within the meaning of the Fair Labor Standards Act of 1938, employ in the production of goods, to-wit: women's coats, suits and skirts and men's and boys' coats, suits and tailored uniforms for interstate commerce, one John M. Gomez, during the workweek beginning November 30,

1941, and ending December 6, 1941, and that the said defendant, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California and within the jurisdiction of this Court, did, on or about December 6, 1941, unlawfully and wilfully fail to pay to the said John M. Gomez wages at a rate not less than forty cents (40c) an hour for the said work so performed by him during the said workweek; that is to say, the defendant did, at the time and place aforesaid, pay to the said John M. Gomez wages at a rate less than forty cents (40c) an hour, to-wit: at the rate of thirty-three cents (33c) an hour for the said work so performed by him during the said workweek;

Against the peace and dignity of the United States of America and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.) [19]

Count VII

And the said United States Attorney, in the manner and form aforesaid, further informs the Court that:

1. Each and every allegation contained in paragraphs 1 to 6 inclusive of the First Count of this formation is hereby referred to and made a part of this count and incorporated by reference with the same force and effect as if here set forth in full.

2. That the defendant, Herman Rosenwasser, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern Dis-

trict of California, and within the jurisdiction of this Court, did, within the meaning of the Fair Labor Standard Act of 1938, employ in the production of goods, to-wit: men's and women's coats and suits and Army and Navy Officers' uniforms for interstate commerce, as aforesaid, one A. C. Schultz for a workweek longer than forty (40) hours, beginning September 14, 1941, and ending September 20, 1941, and the said defendant, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of this Court, on or about September 20, 1941, did unlawfully and wilfully fail to pay the said A. C. Schultz wages for the hours in excess of forty (40) worked by the said A. C. Schultz during the said workweek at a rate not less than one and one-half times the regular rate at which the said A. C. Schultz was employed; that is to say, the said defendant did, at the time and place aforesaid, pay compensation to the said A. C. Schultz for his employment in excess of forty (40) hours during the said workweek at a rate less than one and one-half times the regular rate at which he was employed;

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.) [20]

Count VIII

And the said United States Attorney, in the manner and form aforesaid, further informs the Court that:

1. Each and every allegation contained in paragraphs 1 to 6 inclusive of the First Count of this Information is hereby referred to and made a part of this count and incorporated by reference with the same force and effect as if here set forth in full:

2. That the defendant, Herman Rosenwasser, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of this Court, did, within the meaning of the Fair Labor Standards Act of 1938, employ in the production of goods, to-wit: men's and women's coats and suits and Army and Navy Officers' uniforms for interstate commerce, as aforesaid, one Lukena Patella, for a workweek longer than forty (40) hours, beginning March 29, 1942, and ending April 4, 1942, and that the said defendant, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of this Court, on or about April 4, 1942, did unlawfully and wilfully fail to pay to the said Lukena Patella wages for the hours in excess of forty (40) worked by the said Lukena Patella during the said workweek at a rate not less than one and one-half times the regular rate at which the said Lukena Patella was employed; that is to say, the said defendant did, at the time and place aforesaid, pay compensation to the said Lu-

kena Patella for her employment in excess of forty (40) hours during the said workweek at a rate less than one and one-half times the regular rate at which she was employed;

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.) [21]

Count IX

And the said United States Attorney, in the manner and form aforesaid, further informs the Court that:

1. Each and every allegation contained in paragraphs 1 to 6 inclusive of the First Count of this Information is hereby referred to and made a part of this count and incorporated by reference with the same force and effect as if here set forth in full:

2. That the defendant, Herman Rosenwasser, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of this Court, did, within the meaning of the Fair Labor Standards Act of 1938, employ in the production of goods, to-wit: men's and women's coats and suits and Army and Navy Officers' uniforms for interstate commerce, as aforesaid, one Grace Walton, for a workweek longer than forty (40) hours, beginning April 5, 1942, and ending April 11, 1942, and that the said defendant, in the City of Los Angeles, County of Los Angeles, within the

Central Division of the Southern District of California, and within the jurisdiction of this Court, on or about April 11, 1942, did unlawfully and wilfully fail to pay to the said Grace Walton during the said workweek wages for the hours in excess of forty (40) worked by the said Grace Walton during the said workweek at a rate not less than one and one-half times the regular rate at which the said Grace Walton was employed; that is to say, the said defendant did, at the time and place aforesaid, pay compensation to the said Grace Walton for her employment in excess of forty (40) hours during the said workweek at a rate less than one and one-half times the regular rate at which she was employed;

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.) [22]

Count X

And the said United States Attorney, in the manner and form aforesaid, further informs the Court that:

1. Each and every allegation contained in paragraphs 1 to 6 inclusive of the First Count of this Information is hereby referred to and made a part of this count and incorporated by reference with the same force and effect as if here set forth in full;

2. That the defendant, Herman Rosenwasser, in the City of Los Angeles, County of Los Angeles,

within the Central Division of the Southern District of California, and within the jurisdiction of this Court, did, within the meaning of the Fair Labor Standards Act of 1938, employ in the production of goods, to-wit: men's and women's coats and suits and Army and Navy Officers' uniforms for interstate commerce, as aforesaid, one Nathan Berger, for a workweek longer than forty (40) hours, beginning May 31, 1942, and ending June 6, 1942, and that the said defendant, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of this Court, on or about June 6, 1942, did unlawfully and wilfully fail to pay to the said Nathan Berger during the said workweek wages for the hours in excess of forty (40) worked by the said Nathan Berger during the said workweek at a rate not less than one and one-half times the regular rate at which the said Nathan Berger was employed; that is to say, the said defendant did, at the time and place aforesaid, pay compensation the said Nathan Berger for his employment in excess of forty (40) hours during the said workweek at a rate less than one and one-half times the regular rate at which he was employed;

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.) [23]

Count XI

And the said United States Attorney, in the manner and form aforesaid, further informs the Court that:

1. Each and every allegation contained in paragraphs 1 to 6 inclusive of the First Count of this Information is hereby referred to and made a part of this count and incorporated by reference with the same force and effect as if here set forth in full;

2. That the defendant, Herman Rosenwasser, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of this Court, did, within the meaning of the Fair Labor Standards Act of 1938, employ in the production of goods, to-wit: men's and women's coats and suits and Army and Navy Officers' uniforms for interstate commerce, one Jennie Green for a workweek longer than forty (40) hours, beginning September 13, 1942, and ending September 19, 1942, and that the said defendant, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of this Court, on or about September 19, 1942, did unlawfully and wilfully fail to pay to the said Jennie Green during the said workweek wages for the hours in excess of forty (40) worked by the said Jennie Green during the said workweek at a rate not less than one and one-half times the regular rate at which said Jennie Green was employed; that is to say, the said defendant, did, at the time and place aforesaid, pay com-

pensation to the said Jennie Green for her employment in excess of forty (40) hours during the said workweek at a rate less than one and one-half times the regular rate at which she was employed;

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.) [24]

Count XII

And the said United States Attorney, in the manner and form aforesaid, further informs the Court that:

1. Each and every allegation contained in paragraphs 1 to 6 inclusive of the First Count of this Information is hereby referred to and made a part of this count and incorporated by reference with the same force and effect as if here set forth in full:

2. That the defendant, Herman Rosenwasser, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of this Court, did, within the meaning of the Fair Labor Standards Act of 1938, employ in the production of goods, to-wit: men's and women's coats and suits and Army and Navy Officers' uniforms for interstate commerce, one Joseph Krayner, for a workweek longer than forty (40) hours, beginning October 4, 1942, and ending October 10, 1942, and that the said defendant in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, and within

the jurisdiction of this Court, on or about October 10, 1942, did unlawfully and wilfully fail to pay to the said Joseph Krayner during the said workweek wages for the hours in excess of forty (40) worked by the said Joseph Krayner during the said workweek at a rate not less than one and one-half times the regular rate at which the said Joseph Krayner was employed; that is to say, the said defendant did, at the time and place aforesaid, pay compensation to the said Joseph Krayner for his employment in excess of forty (40) hours during the said workweek at a rate of less than one and one-half the regular rate at which he was employed;

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.) [25]

Count XIII

And the said United States Attorney, in the manner and form aforesaid, further informs the Court that:

1. Each and every allegation contained in paragraphs 1 to 6 inclusive of the First Count of this Information is hereby referred to and made a part of this count and incorporated by reference with the same force and effect as if here set forth in full;

2. That the defendant, Herman Rosenwasser, on or about April 7, 1942, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of this Court, unlawfully and wil-

fully sold, transported, shipped and delivered from a point within the State of California to a point outside the State of California, and in the State of Oregon, to-wit: coats and suits, identified by Invoice No. 1758, in the production of which defendant had employed employees for a workweek in excess of forty (40) hours, to whom said defendant failed to make compensation for their employment in excess of forty (40) hours in said workweek at a rate not less than one and one-half times the regular rate at which they were employed, and to whom the said defendant paid wages for the hours worked in excess of forty (40) in said workweek at a rate less than one and one-half times the regular rate at which they were employed, and in the production of which said defendant had employed employees to whom said defendant failed to pay wages at a rate not less than forty cents (40c) an hour and to whom defendant paid wages at a rate less than forty cents (40c) an hour;

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.) [26]

Count XIV

And the United States Attorney, in the manner and form aforesaid, further informs the Court that:

1. Each and every allegation in paragraphs 1 to 6 inclusive of the First Count of this Information is hereby referred to and made a part of this count

and incorporated by reference with the same force and effect as if here set forth in full;

2. That the defendant, Herman Rosenwasser, on or about June 9, 1942, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of this Court, unlawfully and wilfully sold, transported, shipped and delivered, from a point within the State of California, to a point outside the State of California, and in the State of Nevada, goods, to-wit: suits and coats and identified by Invoice No. 3262 in the production of which defendant had employed employees for a workweek in excess of forty (40) hours, to whom said defendant failed to make compensation for their employment in excess of forty (40) hours in said workweek at a rate not less than one and one-half times the regular rate at which they were employed, and to whom the said defendant paid wages for the hours worked in excess of forty (40) in said workweek at a rate less than one and one-half times the regular rate at which they were employed, and in the production of which the defendant had employed employees to whom said defendant failed to pay wages at a rate not less than forty cents (40c) an hour and to whom defendant paid wages at a rate less than forty cents (40c) an hour;

Against the peace and dignity of the United States of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.) [27]

Count XV

And the said United States Attorney, in the manner and form aforesaid, further informs the Court that:

1. Each and every allegation contained in paragraphs 1 to 6 inclusive of the First Count of this Information is hereby referred to and made a part of this count and incorporated by reference with the same force and effect as if here set forth in full;

2. That the defendant, Herman Rosenwasser, on or about October 10, 1942, in the City of Los Angeles, County of Los Angeles, within the Central Division of the Southern District of California, and within the jurisdiction of this Court, unlawfully and wilfully sold, transported, shipped and delivered, from a point within the State of California, to a point outside the State of California, and in the State of Texas, goods, to-wit: suits and coats identified by Invoice No. 3938 in the production of which defendant had employed employees for a workweek in excess of forty (40) hours, to whom said defendant failed to make compensation for their employment in excess of forty (40) hours in said workweek at a rate not less than one and one-half times the regular rate at which they were employed, and to whom the said defendant paid wages for the hours worked in excess of forty (40) in said workweek at a rate less than one and one-half times the regular rate at which they were employed, and in the production of which the said defendant had employed employees to whom said defendant failed to pay wages at a rate not less than forty

cents (40c) an hour and to whom defendant paid wages at a rate less than forty cents (40c) an hour;

Against the peace and dignity of the United states of America, and contrary to the form of the statute in such case made and provided. (Fair Labor Standards Act of 1938.)

Whereupon, the said Attorney for the United States prays that due process of law may be awarded against the said defendant to make him answer the premises aforesaid.

CHARLES H. CARR

United States Attorney

CHARLES H. VEALE

Assistant U. S. Attorney [28]

United States of America,
Southern District of California—ss.

Perry A. Bertram, Attorney, United States Department of Labor, being first duly sworn on his oath says: that he has read the foregoing Information and that the matters contained therein are true and correct to the best of his knowledge and belief.

PERRY A. BERTRAM

Subscribed and sworn to before me this 20th day of January, 1944.

[Seal] FLORENCE LEE MILLER

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires January 27, 1946.

[Endorsed]: Filed Jan. 25, 1944. [29]

[Title of District Court and Cause.]

MOTION TO SUPPRESS

To Charles H. Carr, United States Attorney:

Please notice that on the 6th day of March, 1944, or as soon thereafter as counsel can be heard, defendant Herman Rosenwasser, by his attorney, Bernard B. Laven, will move this Court at Los Angeles, California, for an Order directing that all property consisting of plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 14, and plaintiff's Exhibits for Identification, 4A, 5A, 12A 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30, in Case Number 16152 P.H., entitled United States of America vs. Herman Rosenwasser in the District Court of the United States, for the Central Division of the Southern District of the United States, be excluded as evidence upon the trial of the cause and that they be suppressed and returned to the defendant on the grounds that: [30]

I.

Said property was seized from the defendant, Herman Rosenwasser, on or about the 15th day of February, 1943, which was in possession and control of the defendant and belonged to and was owned by said defendant. That thereafter photostatic copies were made of said property. That his rights under the Fourth and Fifth Amendments to the Constitution of the United States were violated by said search and seizure, in that the same were obtained without a search warrant.

II.

The said seizure was further illegal for the reason that the provisions of the "Fair Labor Standards Act of 1938" or the Regulations thereto do not authorize, provide or permit the use of any documents, records, transcriptions thereof in Criminal prosecutions under said Act or Regulations thereof.

III.

Defendant is further informed and verily believes that the United States intends to use the photostats and transcriptions of said property so seized as the basis of the Criminal prosecution herein against the defendant on the trial of said Information in this cause.

Wherefore, defendant moves that an Order be entered herein, suppressing said Exhibits and each of them as evidence and excluding them at the trial of this cause.

BERNARD B. LAVEN

Attorney for Defendant [31]

United States of America

Southern District of California

Los Angeles County—ss.

Bernard B. Laven, being first duly sworn, deposes and says:

That he is the attorney for the defendant Herman Rosenwasser and that he has read the above and foregoing Motion and that the allegations with reference to the search and seizure are correct, according to his knowledge and believe.

BERNARD B. LAVEN

Subscribed and sworn to before me this 2nd day of March, 1944.

[Seal]

PEARL E. BLEWETT

Notary Public in and for the County of Los Angeles, State of California.

Whereas, the above matter has been continued to March 6, 1944, for plea the time to serve the within Notice is shortened so that service may be made before 5 P.M., March 3, 1944.

Dated this 3rd of March, 1944.

PIERSON M. HALL

Judge [32]

Points and Authorities

The Fourth Amendment forbids unreasonable searches and seizures by Federal Officers, and prevents the use of evidence procured thereby in a Criminal prosecution.

Olmstead vs. U. S., 277 U. S. 438 72 L. Ed. 944, 48 S. Ct. 564.

U. S. vs. Mettingly, 285 Fed. 922.

Boyd v. U. S., 116 U. S. 616-633 29 L. Ed. 746, 6 S. Ct. 524.

“We have already noticed the intimate relation between the two Amendments (speaking of the Fourth and Fifth). They throw great light on each other. For the “unreasonable searches and seizures” condemned in the Fourth Amendment and almost always made for the purpose of compelling a man to give evidence against himself, which in Criminal cases is condemned in the Fifth Amend-

ment; and compelling a man "in a criminal case to be a witness against himself which is condemned in the Fifth Amendment throws light on the question as to what is an unreasonable search and seizure within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms."

Brown vs. U. S., 168 U. S. 532, 42 L. Ed. 568, 18 S. Ct. 183.

A peaceful submission reasonably attributable to a regard for authority of law is not a waiver.

[Endorsed]: Filed March 3, 1944. [33]

[Title of District Court and Cause.]

AFFIDAVIT OF HERMAN ROSENWASSER
IN SUPPORT OF MOTION TO SUPPRESS

United States of America
Southern District of California
County of Los Angeles—ss.

Herman Rosenwasser, being first duly sworn, deposes and says:

That he is the defendant in the above entitled cause;

That on or about the 15th day of February, 1943, at Los Angeles, California, at the defendant's place

of business, one Mary Wiatt Chase, of the Wage and Hour Division of the United States Department of Labor appeared with two men and without a search warrant, or any other process or writ of any kind or nature whatever, stated that she wanted the Social Security Records, Payroll Records and Checks, and Time Sheets of defendant's employees for the year of 1942; Piece Work tickets from April to [34] December, 1942, and all invoices of shipments of merchandise made by defendant, from February 1942 to December 31, 1942; that she had some more checking to do of defendant's records and could do it better at the Department's office, and that the Wage and Hour Law provided for such inspection; that she would give defendant a receipt for the said records and return them as soon as the department had made a further check. That thereupon the defendant delivered the records demanded for the purpose specified by Mary Wiatt Chase;

That the said property was his business records and private property and he would not have given them to the said Mary Wiatt Chase had he known or been informed by her or the two men accompanying her that photostatic copies were to be made of said records and the said photostats were going to be used against the defendant in a Criminal Proceeding or prosecution.

Wherefore, affiant prays that the Motion to Suppress the Evidence be granted.

HERMAN ROSENWASSER

Subscribed and sworn to before me this 2nd day of March, 1944.

[Seal] PEARL E. BLEWETT.

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires February 21, 1948.

[Endorsed]: Filed March 3, 1944. [35]

At a stated term, to-wit: The February Term, A. D. 1944, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 6th day of March in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable Peirson M. Hall, District Judge.

[Title of Court.]

No. 16,564—Crim.

This cause coming on for hearing on defendant's plea of former jeopardy, filed February 23, 1944; hearing on defendant's motion for a Bill of Particulars, filed February 23, 1944; hearing on defendant's motion to quash each and every count, pursuant to notice filed March 3, 1944; hearing on demurrer to Information, pursuant to notice filed March 3, 1944, and hearing on defendant's motion to suppress, pursuant to notice filed March 3, 1944;

V. P. Lucas, Esq., Assistant U. S. Attorney, appearing for the Government; Bernard B. Laven, Esq., appearing for the defendant; M. A. Barr, Court Reporter, being present and reporting the proceedings; the defendant being present;

Attorney Laven argues in support of motion for Bill of Particulars, and at the suggestion of the Court counsel for defendant argues in support of defendant's motion to suppress evidence in the form of plaintiff's exhibits 1 to 12, inclusive, 14, 4A, 5A, and 13 to 30, inclusive, on the ground that said exhibits were obtained without a legal subpoena duces tecum, citing Sec. 49, pp. 401 and 411, U. S. Code.

Attorney Lucas now argues in opposition to said motion to suppress.

The motion to suppress the evidence is ordered granted and that said exhibits be returned.

The Court further states that the hearing on motion to quash and demurrer should be deferred until the decision is made on defendant's motion for Bill of Particulars. [36]

Attorney Lucas opposes motion for Bill of Particulars.

The Court orders motion for Bill of Particulars granted as to paragraph I and denied as to paragraph II.

It is further ordered that hearing on plea of former jeopardy, defendant's motion to quash each and every count, and demurrer be continued to March 27, 1944, at 10 A.M. [37]

In the District Court of the United States in and
for the Southern District of California, Central Division

No. 16564

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HERMAN ROSENWASSER, an individual doing
business under the firm name and style of
PERFECT GARMENT COMPANY,

Defendant.

ORDER TO SUPPRESS EVIDENCE

This matter having regularly come before me, on the 6th day of March, 1944, pursuant to a Notice of Motion by the defendant, Herman Rosenwasser, to Suppress Evidence, Charles H. Carr, United States Attorney, appearing by V. P. Lucas, Assistant United States Counsel for the United States of America, and Bernard B. Laven, appearing as counsel for the defendant, Herman Rosenwasser, and the Court being fully advised in the premises, and good cause appearing therefor:

It Is Hereby Ordered that the plaintiff's exhibits and exhibits for identification in Case Number 16152, P.H. entitled United States of America vs. Herman Rosenwasser in the above entitled Court, be and they are hereby suppressed and that all invoices, records, bills, files and notations, and/or photostats, copies, or data secured therefrom or information obtained therefrom directly or indirectly

[38] be and it is hereby forever suppressed and the United States of America, and/or its officers and agents are barred from using any such invoices, bills, records, data or information or any matter obtained therefrom directly or indirectly in any proceeding of any kind or character whatsoever against this defendant; and,

It Is Further Ordered, Adjudged, and Decreed:

That the officers and agents of the United States Department of Labor, Wage and Hour Division thereof, and/or any other person obtaining information or data therefrom or any copies thereof, no matter in what form, must return the same forthwith to the defendant Herman Rosenwasser.

Dated this 27th day of March, 1944.

PEIRSON M. HALL

Judge

Received Copy of the Within this 27 day of Mar., 1944.

V. P. LUCAS

[Endorsed]: Filed Mar. 27, 1944. [39]

[Title of District Court and Cause.]

PETITION FOR APPEAL

To: Honorable Peirson M. Hall, Judge of said Court.

Now Comes your petitioner, United States of America, plaintiff in the above-entitled cause, by

Charles H. Carr, United States Attorney for the Southern District of California, its attorney, and shows to the Court that heretofore, to-wit on March 6, 1944, the District Court of the United States for the Southern District of California, Central Division, made an order sustaining defendant's Motion to Suppress Evidence, and thereafter and on March 27, 1944, signed a formal order suppressing said evidence and ordering the return thereof to the defendant; and your petitioner further shows to the court that said defendant has not been by the said decision and judgment of said Court, and has not been, in and by said proceedings in said cause, put in jeopardy, but that by the sustaining of defendant's demurrer on March 27, 1944, and the formal order thereafter on April 11, 1944, [40] and the said order granting the motion to suppress the evidence is in legal effect a final order, all of which will more fully appear from the records of this court in the office of the Clerk of this Court.

Your petitioner further represents that the action taken by said court in suppressing the evidence and ordering the return thereof is error and is not supported by the record in said cause and proceedings and that manifest and prejudicial error has intervened to the damage of your petitioner by reason thereof, as will more fully appear in the within Assignment of Errors which is presented and filed herewith and considered a part hereof.

Wherefore, and to the end that said error may be corrected, your petitioner prays an appeal in said cause from the District Court of the United States

for the Southern District of California to the Circuit Court of Appeals of the United States, Ninth Circuit, as by law provided; that citation be issued as provided by law and a transcript of the record, proceedings and documents, upon which said action was taken by said court, duly authenticated, be sent to the Circuit Court of Appeals for the Ninth Circuit, under the rules of said court in such cases made and provided.

Your petitioner further prays that pursuant to Statute in such cases made and provided, no bond or surety be required of it.

CHARLES H. CARR

United States Attorney, for
the Southern District of
California.

Attorney for the United States
of America, Appellant.

[Endorsed]: Filed Apr. 25, 1944. [41]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

Now on this 24th day of April, 1944, there is presented to the Court the petition of plaintiff, United States of America, praying for an appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit, and it appearing to the Court that there has been filed with said petition for an appeal an Assignment of Error, setting forth

separately and particularly each error asserted and intended to be urged:

It Is Therefore Ordered by the Court that an appeal be and the same is hereby allowed said plaintiff, United States of America, as provided by law, to the United States Circuit Court of Appeals for the Ninth Circuit, to review the decision, proceedings, and the judgment and action taken by the Court in this case wherein the Court granted the motion to defendant to suppress and return the evidence; that citation be issued as provided by law; that a full transcript of the proceedings in this case be, by the Clerk of this Court, [42] presented and filed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and that pursuant to Statute in such cases made and provided, no supersedeas bond or cost bond or surety for the same need be filed herein by plaintiff, United States of America.

Dated: Los Angeles, California, this 24th day of April, 1944.

PEIRSON M. HALL

United States District Judge.

[Endorsed]: Filed Apr. 25, 1944. [43]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes Now the United States of America by Charles H. Carr, United States Attorney for the

Southern District of California, its Attorney, and having made and filed its Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the Orders and Judgment entered in the above-entitled cause against it on the 6th and 27th days of March, 1944, now makes and files with the Notice of Appeal the following Assignment of Errors herein upon which it will apply for reversal of the said Order and Judgment and each of them upon appeal, and which errors and each of them are to the great detriment, prejudice and injury of said appellant, in violation of the rights conferred upon it by law, and said appellant says that in the record, proceedings, rulings, orders and judgment, in the above-entitled cause and the determination thereof in the Central Division of the United States District Court in and for the Southern District of California, manifest error has intervened to [44] its prejudice, namely:

(1) The Court erred in granting the motion of defendant to suppress and return the exhibits for the reason that the said exhibits had been previously offered in evidence and admitted in the trial of Case No. 16152, *United States v. Herman Rosenwasser*, and were no longer in the possession of the United States Attorney's office and therefore the United States Attorney had no power to return the evidence to the defendant.

(2) The Court erred in making and entering the order suppressing the evidence and ordering the return thereof for the reason that the admissibility of said evidence had been determined in the previ-

ous trial of the case and the question of its admissibility was therefore *res adjudicata* and became the law of the case.

(3) The Court erred in granting the Motion to Suppress and ordering the return of the evidence for the reason that the affidavit in support of said motion did not show an illegal or unreasonable search and seizure or any search and seizure at all, but affirmatively showed the voluntary surrender by the defendant of the records requested of him by the investigating officers of the Wage and Hours Division of the Department of Labor.

(4) The Court erred in directing the transfer to defendant of the photostatic copies of said exhibits for the reason that the said photostatic copies were the property of the United States and had never been the property of the defendant. [45]

(5) The Court erred in permanently enjoining the representatives of the United States Government and in particular the Wage and Hours Division thereof, from making any use of the photostats or information derived therefrom in any other proceeding whatever either civil or criminal thereby converting a motion to suppress into an independent bill in equity, and making a final order therein.

CHARLES H. CARR

United States Attorney for
the Southern District of
California

Attorney for the United States
of America, Appellant

[Endorsed]: Filed May 20, 1944. [46]

[Title of District Court and Cause.]

NOTICE OF SERVICE AND RECEIPT

To: Herman Rosenwasser, an individual doing business under the firm name and style of Perfect Garment Company:

Pursuant to rules of Court and practice, you are hereby served with copies of petition for appeal, order allowing appeal, assignment or error, notice of appeal and citation in the above-entitled cause.

CHARLES H. CARR

United States Attorney for
the Southern District of
California.

Attorney for the Appellant

Service is acknowledged this 2nd day of May, 1944.

BERNARD B. LAVEN

Counsel for the Appellee

[Endorsed]: Filed May 3, 1944. [47]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk, District Court of the United States for the Southern District of California, Central Division:

The appellant, the United States of America, hereby directs that in preparing the transcript of

the record in this cause in the District Court of the United States for the Southern District of California, Central Division, you include the following:

1. Docket entries and minute entries showing filing of the information, the filing of the notice of motion to suppress the evidence, the demurrer to the information, the order granting the motion to suppress the evidence and return thereof.

2. The information.

3. The affidavit of Herman Rosenwasser in support of motion to suppress.

4. The Motion to suppress the evidence.

5. The order to suppress the evidence. [48]

6. The minute order of March 6th, 1944, granting the motion to suppress the evidence.

7. The written order dated March 27, 1944, signed by the Judge, suppressing the evidence.

8. The Petition for appeal to the Circuit Court of Appeals for the Ninth Circuit.

9. Statement as to the jurisdiction of the Circuit Court of Appeals for the Ninth Circuit Court of Appeals.

10. Assignment of errors.

11. The order allowing appeal.

12. The notice of service on the Appellee of the petition for appeal, order allowing appeal, assignment of errors, and statement as to jurisdiction.

13. The citation.

14. The praecipe.

CHAS. H. CARR

United States Attorney for
the Southern District of
California

Service of the foregoing Praeceptum for Transcript of Record is acknowledged this 2nd day of May, 1944.

BERNARD B. LAVEN

Counsel for Appellee

[Endorsed]: Filed May 3, 1944. [49]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 49 inclusive contain the original Citation and full, true and correct copies of: A Portion of the Docket Entries; Minute Order Entered January 25, 1944; Information; Motion to Suppress; Affidavit of Herman Rosenwasser in Support of Motion to Suppress; Minute Order Entered March 6, 1944; Order to Suppress Evidence; Petition for Appeal; Order Allowing Appeal; Assignment of Errors; Notice of Service and Receipt; and Praeceptum for Transcript of Record which constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 24 day of May, 1944.

[Seal]

EDMUND L. SMITH,

Clerk,

By THEODORE HOCKE,

Deputy Clerk.

[Endorsed]: No. 10782. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Herman Rosenwasser, an individual doing business under the firm name and style of Perfect Garment Company, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed May 25, 1944.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10782 Cr.

UNITED STATES OF AMERICA,

Appellant,

v.

HERMAN ROSENWASSER, an individual doing
business under the firm name and style of
PERFECT GARMENT COMPANY,

Appellee.

DESIGNATION OF POINTS ON APPEAL
AND TRANSCRIPT

To: The Clerk of the United States Circuit
Court of Appeals, for the Ninth Circuit:

In conformity with Rule 19, sub-division 6, the Appellant hereby adopts the Assignment of Errors appearing in the transcript of record as its points on appeal and designates for printing the entire transcript.

Dated: May 30, 1944.

CHARLES H. CARR,

United States Attorney.

JAMES M. CARTER,

Assistant U. S. Attorney.

V. P. LUCAS,

Assistant U. S. Attorney.

Attorneys for Appellant.

(Affidavit of Service by Mail.)

[Endorsed]: Filed June 2, 1944. Paul P. O'Brien, Clerk.

No. 10782

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

HERMAN ROSENWASSER, an individual doing business
under the firm name and style of PERFECT GARMENT
COMPANY,

Appellee.

APPELLANT'S OPENING BRIEF.

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AUG 14 1944

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TOPICAL INDEX.

	PAGE
Jurisdictional statement.....	3
Statute involved	3
Specification of errors.....	3
Argument	5

I.

The court erred in granting the motion of defendant to suppress and return the exhibits for the reason that the said exhibits had been previously offered in evidence and admitted in the trial of case No. 16152, United States v. Herman Rosenwasser, and were no longer in the possession of the United States Attorney's office and therefore the United States Attorney had no power to return the evidence to the defendant.....	5
--	---

II.

The court erred in making and entering the order suppressing the evidence and ordering the return thereof for the reason the admissibility of said evidence had been determined in the previous trial of the case and the question of its admissibility was therefore res adjudicata and became the law of the case.....	8
--	---

III.

The court erred in granting the motion to suppress and ordering the return of the evidence for the reason that the affidavit in support of said motion did not show an illegal or unreasonable search and seizure or any search and seizure at all, but affirmatively showed the voluntary surrender by the defendant of the records requested of him by the investigating officers of the wage and hours division of the Department of Labor.....	12
--	----

IV.

The court erred in directing the transfer to defendant of the photostatic copies of said exhibits for the reason that the said photostatic copies were the property of the United States and had never been the property of the defendant..... 15

V.

The court erred in permanently enjoining the representatives of the United States Government and in particular the wage and hours division thereof, from making any use of the phototats or information derived therefrom in any other proceeding whatever either civil or criminal, thereby converting a motion to suppress into an independent bill in equity, and making a final order therein..... 17

TABLE OF AUTHORITIES CITED.

CASES.

	PAGE
Agnello v. United States, 269 U. S. 20.....	17
Carroll v. United States, 267 U. S. 132.....	13
Cogen v. United States, 278 U. S. 221.....	17
Dowling v. Collins, 10 Fed. (2d) 62; cert. den. 46 S. Ct. 356....	22
Gouled v. United States, 255 U. S. 298.....	17
Lisansky v. United States, 31 Fed. (2d) 846.....	8, 15
Marron v. United States, 275 U. S. 192.....	17
Orient Ins. Co. v. Leonard, 120 Fed. 808; cert. den. 187 U. S. 645	20
Panzich v. United States, 285 Fed. 871.....	17
Rocchia v. United States, 78 Fed. (2d) 966.....	10, 15, 16
Steele v. United States, 267 U. S. 498; 267 U. S. 505.....	7, 22
United States v. California Bridge Company, 245 U. S. 337.....	20
United States v. Marquette, 270 Fed. 214.....	13, 18, 19
Weeks v. United States, 232 U. S. 383.....	17

STATUTES.

Fair Labor Standards Act of 1938 (29 U. S. C. A., Secs. 15(a) (1), 15(a)(2), 15(a)(5)).....	1
Fair Labor Standards Act of 1938 (29 U. S. C. A., Sec. 201)....	1
Fair Labor Standards Act of 1938 (29 U. S. C. A., Sec. 161)....	3
Judicial Code, Sec. 128.....	17
National Prohibition Act of June 15, 1917, Title II, Sec. 6.....	7
United States Code, Title 18, Sec. 546.....	3
United States Code, Title 18, Sec. 682.....	3
United States Code, Title 28, Sec. 41(a).....	3
United States Code, Title 28, Sec. 345.....	3



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APPELLANT'S OPENING BRIEF.

By an Information filed January 25, 1944, by the United States Attorney in and for the Southern District of California, Central Division, the appellee herein was charged with violation of Title 29, U. S. C. A. Sections 15 (a) (1), 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act of 1938 [R. 5 to 31]. The Information contained fifteen counts which charged the defendant with a violation of the record keeping, minimum wage, overtime, and interstate shipment provisions of the Fair Labor Standards Act of 1938 (29 U. S. C. A. 201 *et seq.*).

The defendant filed a motion for a Bill of Particulars, and demurred to the Information on the ground that "The said counts of the said Information fail to disclose and it cannot be ascertained therefrom whether the alleged em-

ployees of the defendant were employed and working at a regular rate of pay, subject to the provisions of the Act, or working on a piece work basis at an irregular rate of pay.”

The defendant also filed a motion to suppress and return the evidence, which was supported by the affidavit of the defendant. The District Judge granted, in part, the motion for Bill of Particulars, and postponed his ruling on the demurrer until after the filing of the Bill of Particulars, and thereafter sustained the demurrer with respect to certain counts of the Information. The Court also granted the Motion to Suppress and Return the Evidence, which is the order of the Court appealed from by this appeal.

The Motion to Suppress the Evidence is set forth in its entirety [R. 32, 33]. The affidavit of the defendant, Herman Rosenwasser, in support of the Motion to Suppress the Evidence, is in the Record, pages 35 and 36. The order suppressing and returning the evidence is shown on pages 39 and 40 of the Record.

The oral hearing on the Motion to Suppress the Evidence came before the Court on the 6th day of March, 1944, and thereafter a formal written order was made and entered on the 27th day of March, 1944.

The Information in this case is a re-filing of a prior identical information against the same defendant (S. D. Cal. No. 16152—Criminal) in which there had been a verdict of guilty on six counts submitted to the jury but the District Judge on January 10, 1944, granted the defendant's motion for a new trial.

All of the evidence referred to in the Motion and Order to Suppress had been previously introduced at the trial of the original case, and this explanation is made to clarify

for the Court the references contained in the Motion to Suppress and the Order based thereon.

The matter is now before this Honorable Court upon appeal from the order suppressing and directing the return of the evidence.

Jurisdictional Statement.

(a) The District Court had jurisdiction under the provisions of Section 41 (a) of Title 28 of the United States Code.

(b) Under Section 546 of Title 18, United States Code, the crime with which defendant was charged is cognizable in the District Court.

(c) This Court has jurisdiction by virtue of the provisions of Section 682 of Title 18, United States Code, as well as the provisions of Section 345 of Title 28, United States Code.

STATUTE INVOLVED

The Fair Labor Standards Act of 1938, 29 U.S.C.A. 201 et seq. in its pertinent and applicable parts, provides:

"The Administrator or his designated representatives * * * may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act."

Specification of Errors.

The District Court erred in granting defendant's Motion to Suppress and Return the Evidence, and committed prejudicial error in the following particulars:

(1) The Court erred in granting the motion of defendant to suppress and return the exhibits for the reason that

the said exhibits had been previously offered in evidence and admitted in the trial of Case No. 16152, United States v. Herman Rosenwasser, and were no longer in the possession of the United States Attorney's office and therefore the United States Attorney had no power to return the evidence to the defendant.

(2) The Court erred in making and entering the order suppressing the evidence and ordering the return thereof for the reason that the admissibility of said evidence had been determined in the previous trial of the case and the question of its admissibility was, therefore, *res adjudicata* and became the law of the case.

(3) The Court erred in granting the Motion to Suppress and ordering the return of the evidence for the reason that the affidavit in support of said motion did not show an illegal or unreasonable search and seizure or any search and seizure at all, but affirmatively showed the voluntary surrender by the defendant of the records requested of him by the investigating officers of the Wage and Hours Division of the Department of Labor.

(4) The Court erred in directing the transfer to defendant of the photostatic copies of said exhibits for the reason that the said photostatic copies were the property of the United States and had never been the property of the defendant.

(5) The Court erred in permanently enjoining the representatives of the United States Government and in particular the Wage and Hours Division thereof, from making any use of the photostats or information derived therefrom in any other proceeding whatever either civil or criminal thereby converting a motion to suppress into an independent bill in equity, and making a final order therein.

ARGUMENT.

I.

The Court Erred in Granting the Motion of Defendant to Suppress and Return the Exhibits for the Reason That the Said Exhibits Had Been Previously Offered in Evidence and Admitted in the Trial of Case No. 16152, United States v. Herman Rosenwasser, and Were No Longer in the Possession of the United States Attorney's Office and Therefore the United States Attorney Had No Power to Return the Evidence to the Defendant.

In support of this point the appellant directs the attention of the Court first, to the Motion to Suppress the Evidence filed in the District Court, which Motion is found on page 32 of the Record, and by its terms shows that the evidence sought to be suppressed had been previously introduced as Government exhibits in the prior trial of the case. The evidence is referred to as exhibits and exhibits for identification, and further referred to their numerical order, and the title of the case is given as well as the number. This showing in the motion, therefore, raises the question, first, as to whether or not the Court could order the United States Attorney to return the evidence because the motion itself shows that the evidence sought to be suppressed and returned is not only no longer in the custody of the United States Attorney but is actually in the custody of the Clerk of the United States District Court as evidence in the previous trial of the same case, and it would be beyond the power or authority of the United States Attorney to in any way command or control the Clerk of the United States District Court.

The affidavit on which the motion was made shows that the evidence sought to be suppressed and returned came into the possession of Agents of the Wage and Hours Division of the United States Department of Labor and not into the possession of the United States Attorney in the first instance.

Paragraph three of the Motion does not allege, as it could not allege, that the evidence sought to be suppressed and returned is even in the custody of the United States Attorney and the affidavit on which the Motion was made does not show on its face any unreasonable search or seizure.

What has been said so far clearly demonstrates that the first assignment of error is well taken and that the matter is *res judicata*. Assuming that the affidavit of Herman Rosenwasser as to how he surrendered the documents to the Wage and Hours Division is correct, the affidavit and motion show that there was a previous trial against this same defendant concerning the subject matter and in which the evidence was offered and admitted. Either the defendant objected to its introduction at the previous trial and his objection was overruled, or the evidence was offered by the Government and introduced without objection. In either instance it went into evidence, and a decision as to its admissibility was made by the Court. Such a ruling precludes the defendant from thereafter having a second ruling on the same point because if in the previous trial he had objected and his objection been overruled, or if he had made a motion to return and the motion was denied, such rulings would have been appealable by the defendant either before trial or after a verdict rendered against him.

This view of the situation is amply supported by the decision of the United States Supreme Court in the case

of *Steele v. United States*, 267 U. S. 498, and 267 U. S. 505.

The first appeal was from the order denying a petition of the defendant for an order vacating a search warrant. It was found by the Court that the search warrant was properly issued upon probable cause and the action of the lower court in refusing to vacate the search warrant was sustained. After the mandate on this appeal was sent to the trial court, the defendant was tried and convicted and thereafter took a direct writ of error to the Supreme Court in which he urged as grounds for appeal the competency of the evidence gained as a result of the search made under the search warrant, and also raised the question that the search warrant was issued to a general Prohibition Agent whereas Section 6 of Title II of the National Prohibition Act of June 15, 1917, said that such a warrant must be issued to "a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof," and argued from this that a Prohibition Agent appointed by the Commissioner of Internal Revenue is not a civil officer of the Government in a constitutional sense.

Concerning these two questions, the Supreme Court, speaking through Mr. Chief Justice Taft, said:

"It should first be said that *Steele* is not in a position to raise this question. He might have raised it in the preceding case, but he did not do so and did not assign error on account of it in his appeal to this Court. *The refusal to vacate the search warrant and to return the liquor seized was a final decree.* The question is, therefore, *res judicata* as against him." (Emphasis added.)

It is to be noted that the first appeal referred to in the quoted language was from a judgment of the District Court refusing to vacate a search warrant and the appeal was direct from that order refusing to vacate, and the opinion does not disclose the state of the record before the District Court, namely, whether an indictment had been filed against the defendant or whether he filed a special proceeding or a Bill of Equity before indictment was filed against him. In any event, appellant deems this lack of clarity in the record to be immaterial for the reason that which ever way the question was raised in the *Steele* case, the holding that the matter was *res judicata* would have been made in any event.

II.

The Court Erred in Making and Entering the Order Suppressing the Evidence and Ordering the Return Thereof for the Reason That the Admissibility of Said Evidence Had Been Determined in the Previous Trial of the Case and the Question of Its Admissibility Was Therefore Res Adjudicata and Became the Law of the Case.

This point is very closely associated with the previous point and whatever has heretofore been said is equally applicable under this heading, but we will make further observations and cite other authorities more in keeping with the facts in the instant case.

We direct the attention of the Court to the case of *Lisansky v. United States*, 31 F. (2d) 846, which was an appeal by a defendant convicted of a conspiracy to violate the law, and in which the Government produced photostatic copies of certain records and documents procured in much

the same manner as were the documents in the instant case. The Court in that case said.

“The books were shown to be in the possession of the defendants; and, because of the provisions of the Fourth and Fifth Amendments, the court was without power to require their production at the trial. And it was not permissible for the Government even to lay the foundation for the introduction of copies of the books, as in civil cases, by making demand for their production in open court or by introducing in evidence notice of such demand. But evidence as to the contents of books and papers is not lost to the Government because the defendant has them in his possession and their production cannot be ordered on the usual basis laid for the introduction of secondary evidence.
* * *

“The rule applicable in such cases was well stated by Mr. Justice Day, then a Circuit Judge of the Sixth Circuit, in the McKnight case, as follows:

“‘The authorities seem very clear that in such cases, where a criminating document directly bearing upon the issue to be proven is in the possession of the accused, the prosecution may be permitted to show the contents thereof, without notice to the defendant to produce it. * * * As the introduction of secondary evidence of a writing in such instances is founded upon proof showing the original to be in the possession of the defendant, it will ordinarily be in his power to produce it, if he regards it for his interest to do so.’

“And there is nothing in the point that this evidence was obtained in violation of the Fourth and Fifth Amendments to the Constitution. There was no search or seizure of the books of defendant, nor was their production compelled by any legal process.

On the contrary, the defendants voluntarily showed them to the Government agents and left them in their possession for auditing. We know of nothing in the Constitution, or elsewhere, which would prevent the agents from testifying to knowledge acquired while auditing them. The cases cited by defendants, such as *Gould v. U. S.*, 255 U. S. 298, 41 S. Ct. 261, 65 L. Ed. 647, and *Henderson v. U. S.* (C. C. A. 4th), 12 F. (2d) 528, 51 A. L. R. 420, lay down sound propositions of law, but are so clearly inapplicable to the facts of this case that we deem it unnecessary to distinguish them. See *Olmstead v. U. S.*, 277 U. S. 438, 48 S. Ct. 564, 72 L. Ed. 944, and *Hester v. U. S.*, 265, U. S. 57, 44 S. Ct. 445, 68 L. Ed. 898."

The last quoted paragraph of the above citation is, we think, particularly applicable in this case, because it is a definite holding that to permit such testimony would not be a violation of the Fourth and Fifth Amendments to the Constitution, and such language is equally applicable to the situation as shown by the affidavit of the defendant in this case because the affidavit makes it very clear that he voluntarily surrendered his books and documents to the Government agents, and while in their possession with his consent, the photostatic copies were made.

Another case, that of *Rocchia v. United States*, 78 F. (2d) 966, decided by this Circuit in August, 1935, also supports the position of the Government in regard to the introduction of the photostatic documents.

It would appear from the reading of that case that *Rocchia* was arrested for a violation of the National Prohibition Act, and certain evidence, including documentary evidence, was taken by the officers at the time of the arrest. In a hearing before the Commissioner, after the arrest, the Commissioner ordered the evidence returned on the

ground that the search was unlawful. Thereafter, apparently the District Court also made an order directing the return of the evidence to the defendant. Whether this order was made in a special proceeding or in a previous action is not quite clear from the opinion. At page 970 of the opinion we find as follows:

“The indictment was returned in this case on November 14, 1933. On December 23, 1933, appellant made a motion to suppress the evident. This motion was heard January 6, 1934. The motion to suppress was amended February 2, 1934; on February 3rd the amended motion was denied; thereafter, on February 10, 1934, the appellant pleaded not guilty and the case was called for trial June 26, 1934.”

Immediately following the above quotation in the opinion, is the following reference to the previous proceeding, but from it we cannot determine the nature of the previous proceeding:

“Neither in the original motion to suppress the evidence nor in the amended motion was the effect of the order of the District Court made in the previous proceeding directing the return of the evidence to the appellant presented to the trial court. If the question of the effect of the previous order had been raised on the motion, it would be necessary to determine whether or not the former order was *res judicata* as to the unlawfulness of the search and seizure. Not having been presented at that time, the attempt to raise the question at the trial by way of objection to the evidence was too late.”

We think the above quoted language is particularly pertinent because, as we have heretofore argued, both the motion and the order granting the motion each show that

the evidence was previously introduced in the trial of the defendant on identically the same charges. Therefore, the character of the previous proceedings and the nature of the evidence was brought before the Court in the previous trial as well as on the motion to suppress, and there can be no question but what the matter is *res judicata* because the affidavit in support of the motion shows the original voluntary surrender of the documents by the defendant, and does not even hint or suggest that there was another or different taking by the Government.

III.

The Court Erred in Granting the Motion to Suppress and Ordering the Return of the Evidence for the Reason That the Affidavit in Support of Said Motion Did Not Show an Illegal or Unreasonable Search and Seizure or Any Search and Seizure at All, but Affirmatively Showed the Voluntary Surrender by the Defendant of the Records Requested of Him by the Investigating Officers of the Wage and Hours Division of the Department of Labor.

An examination of some of the authorities previously cited under the other specifications shows that they have some applicability to the question of the affirmative showing that, in this case, the evidence sought to be returned was voluntarily surrendered and, therefore, there was no search or seizure whatever.

Whenever the question of the return of property or the suppression of evidence has been before the Court for consideration, invariably the motion for the return or suppression has been grounded upon an alleged violation of the constitutional rights of the defendant under the Fourth and Fifth Amendments to the Constitution, and

the courts have been ever zealous to protect the constitutional rights of the citizens. The fact that these decisions have all been made upon constitutional grounds gives a certain pattern to the whole law of search and seizure, and therefore the decisions of the Court are to that extent but amplification or extension of the pattern established by the facts of each case when fitted into constitutional rights.

Unfortunately few, if any, of the decisions turn on the question of the voluntary surrender of the evidence and, therefore, every decision in which the Court has found a violation of constitutional rights it has ordered a return of the property to the defendant, or its suppression, and in most of the decisions the appeal has been taken by the defendant from an order of the District Court denying him the relief sought. These appeals have sometimes been taken from orders made in special proceedings, but usually are appeals after convictions. Therefore, the question of the appealability of an order made in favor of the defendant and against the Government has sometimes, particularly in the *Marquette* case, 270 Fed. 214, not been given the full consideration which the point deserves, but has been decided on the basis of language found in prior opinions discussing constitutional questions raised by a defendant and not by the Government, and thus we feel the character of such an order made against the Government has not been fully considered and there is no firm foundation for holding it to be interlocutory.

The case of *Carroll v. United States*, 267 U. S. 132, carefully reviewed all prior decisions on search and seizure, and redeclared all fundamental principles with respect to search of buildings and outbuildings, and then announced the doctrine that would be applicable to automobiles and other mobile property of a defendant. This decision very carefully distinguished the difference be-

tween these two classes of property and also re-announced, what is sometimes forgotten, namely, that the constitution does not denounce all searches and seizure but only such as are unreasonable.

Bearing in mind the voluntary character of the surrender of the documents in the instant case and that the affidavit does not show anything unreasonable in the act of the Government agents in appearing at the place of business of the defendant, we come now to a consideration of the order, itself, to see if it can be truly held that it is interlocutory in character.

The order provides that exhibits and exhibits for identification in the previous case between the same parties be returned, and all photostats, copies or data secured therefrom or information obtained therefrom, directly or indirectly, are forever suppressed. This, we think, is beyond the power of the court to do. Clearly, the photostatic copies of the records were never the property of the defendant, and if they were not unlawfully obtained the Government is entitled not only to their possession but to their use in any lawful manner, and any order depriving it of such use under the circumstances constitutes an injunction from which an appeal lies. It also is a determination of property rights without due process of law which would make the order void instead of voidable. A void order may be said to be no order at all, and the only way the Government can protect its rights under the circumstances is by direct appeal. The order further provides that the agents of the Wage and Hours Division of the Government, and all other persons, must forthwith return the photostatic documents to the defendant, which part of the order is also a determination of the title and right of possession of the property and constitutes a con-

fiscation of Government property without process of law and is, therefore, a final order from which an appeal will lie.

The facts in this case are so distinctly different than the facts in any of the other decided cases, whether in this Circuit or in the United States Supreme Court, that we feel that no prior decision sets forth the true rule or principle which is applicable herein and which would in any way defeat the consideration of this appeal on its merits.

IV.

The Court Erred in Directing the Transfer to Defendant of the Photostatic Copies of Said Exhibits for the Reason That the Said Photostatic Copies Were the Property of the United States and Had Never Been the Property of the Defendant.

In discussing this specification we will quote from the *Rocchia* and *Lisansky* cases, used in another heading but the quotations will have particular reference to the fact that the evidence sought to be suppressed was photostatic copies of documents.

The *Lisansky* case involved the question of photostatic evidence and concerning it the Court said:

“The next point strenuously insisted upon by defendants is that the trial court erred in allowing agents of the government to testify as to the contents of books and records of defendants, and in permitting photostatic copies of certain pages of these to be introduced in evidence. The basis of these objections is, first, that the oral testimony and the photostatic copies were received in violation of the best

evidence rule; and, second, that the evidence was obtained in violation of the rights of defendants under the Fourth and Fifth Amendments to the Constitution. We see nothing in either of these points.”

In the *Rocchia* case the same question of the introduction of photostatic copies was discussed, and there this Circuit said as follows:

“During the trial the appellant objected to the introduction of photostatic copies of documents that had been taken from his possession upon the ground that they had been obtained by an unlawful search and seizure. In making this objection counsel offered to prove in support thereof that the property had been ordered returned by the District Court on January 30, 1933, prior to the return of the indictment in the case at bar, and after a preliminary hearing before the Commissioner at which the Commissioner determined that it had been obtained by an unlawful search and seizure and dismissed the appellant, and that the search there involved was the identical search involved herein. This objection was in effect a renewal of the motion to suppress the evidence which had been previously denied by the trial court. * * *”

“The appellant also objected to these photostatic copies on the ground that they are not the best evidence. The objection being based partly upon the ground that the original papers had been returned to appellant and were not in the possession of the Government was in effect a statement that they were in his possession and not in the possession of the Government. That being true, secondary evidence was admissible in the absence of a tender of better evidence by appellant.”

V.

The Court Erred in Permanently Enjoining the Representatives of the United States Government and in Particular the Wage and Hours Division Thereof, From Making Any Use of the Photo-stats or Information Derived Therefrom in Any Other Proceeding Whatever Either Civil or Criminal, Thereby Converting a Motion to Suppress Into an Independent Bill in Equity, and Making a Final Order Therein.

Under this heading appellant will first analyze all of the authorities usually cited on appeals by defendants from orders denying a motion to suppress and return the evidence.

Turning first to the case of *Cogen v. United States*, 278 U. S. 221, we see that this was an application after indictment and before trial for an order for the return of papers and to suppress evidence on the grounds of an unlawful search and seizure. The application was denied in the District Court and the defendant sued out a writ of error in the Circuit Court of Appeals which dismissed the writ, holding that the order sought to be reviewed was an interlocutory order. The Supreme Court granted a writ of *certiorari* for the purpose of deciding whether or not the order of the District Court was a final order within the meaning of Section 128 of the Judicial Code.

In resolving the question the Supreme Court reviewed practically all the prior authorities such as *Gould v. United States*, 255 U. S. 298; *Agnello v. United States*, 269 U. S. 20; *Pansich v. United States*, 285 F. 871; *Weeks v. United States*, 232 U. S. 383; *Marron v. United States*, 275 U. S. 192; and many others, and came to the conclusion that the order appealed from was an interlocutory or-

der and held that the Circuit properly dismissed the appeal.

There are, however, two or three distinctive facts about the instant case which differentiates it from any of the foregoing cited authorities. It will first be noted that most of the cited authorities have been cases where the defendant suffered an adverse ruling in the lower court. Therefore, it is clear that as to the defendant it is not a final order but one from which he has in many instances a further opportunity of objection and, if convicted, an appeal by which to review the action of the District Court. Such right does not exist in the instant case on behalf of the Government, that is the right to proceed to trial and in the event that the defendant goes free, to take an appeal. This distinction in itself, we feel, is sufficient to differentiate the cases so far as to make necessary a different rule. We are not unmindful that this Circuit in the case of *United States v. Marquette*, 270 F. 214, has come to a contrary ruling, but there are points of difference between the *Marquette* case and the instant case in two significant particulars. First, in the *Marquette* case, the officers of the Government, without search warrant or authority, forcibly made their way into a private home and seized and carried away intoxicating liquor. Second, there was no prior ruling on the admissibility of the evidence as there is in the instant case; therefore it is felt that the *Marquette* case is not an authority for the ruling of the District Court in the instant case.

In the present case, as has been pointed out, the defendant voluntarily surrendered the original documents to the agents of the Government, so the position by the Government agents was not founded upon an unlawful invasion of the home or the lack of a search warrant, or

the abuse of any process of the court. The admissibility of the evidence which was suppressed by the trial court had been previously determined in a trial of the identical charges, and the evidence which was suppressed was not the primary evidence which was voluntarily surrendered but secondary evidence of a photostatic character. There having been a prior ruling, the Government feels that the matter is *res judicata* and the order made by the District Court appealable as such.

In the *Marquette* case we cannot help but feel that the holding of this Circuit was predicated primarily upon the violation of the constitutional rights of the defendant by the forcible invasion of his home rather than upon the proposition that the order was an interlocutory one.

There can be but little doubt that an order suppressing the evidence and ordering the return thereof, under the situation shown by this record, is a final order because it substantially deprives the Government of any opportunity whatever of presenting its case. The charges are of a character that the documentary proof thereof is necessary. Obviously, the Government agents would have no knowledge of the defendant's books and other matters shown by the exhibits, unless such information was acquired from the documents themselves in their original form, or from photostatic copies made therefrom, and the sweeping nature of the order precludes the Government witnesses from making any use, whatsoever, of the exhibits, and unless the order of the court is vacated and set aside and held for naught the prosecution of the charges cannot go forward and the finality of the order becomes apparent.

By way of further strengthening the appellant's position that the order herein appealed from is a final order

and not an interlocutory one, we will cite two authorities on the question of *res judicata*, because the appellant feels that if the order in the former trial of the same issues is binding upon the defendant, the order clearly is not an interlocutory order but a final one, and the question of its appealability clear.

In the case of *United States v. California Bridge Company*, 245 U. S. 337, the court had before it for consideration a civil suit concerning the effect of a judgment and whether or not the principle of *res judicata* applies. In disposing of the matter the Court said:

“The doctrine of estoppel by judgment, or *res judicata*, as a practical matter, proceeds upon the principle that one person shall not a second time litigate, with the same person or with another so identified in interest with such person that he represents the same legal right, precisely the same question, particular controversy, or issue, which has been necessarily tried and finally determined, upon its merits, by a court of competent jurisdiction, in a judgment in *personam* in a former suit.”

Clearly, the right of the Government to introduce this evidence falls within the language above quoted. It is precisely the same question. The evidence is exactly the same. It involves the same investigation by the same officers, and the court in the first instance was competent to pass upon it. Therefore, we say, having passed upon it in the former trial, the matter is *res judicata*, and the nature of the interlocutory character of the order, if up for the first time, is not present.

Another case decided by the Seventh Circuit in which *certiorari* was denied in the Supreme Court is that of *Orient, Ins. Co. v. Leonard*, 120 Fed. 808, *certiorari*, de-

nied, 187 U. S. 645. This action was based upon a fire insurance policy and was tried in the District Court, and appealed to the Circuit where the holding of the District Court was reversed and the matter retried and the citation is to the second appeal. In this case the court said:

“Now, when Mr. Leonard, on the second trial, again produced evidence that an explosion in the neighboring mill made a hole in the wall, through which the fire ensuing upon and connected with the explosion entered, and destroyed his stock, the court was not at liberty to follow its own or counsel’s view of the law in ruling on the company’s motion for a directed verdict in its favor. The law of the case, determined by the former decision, required the denial of the motion, and the submission of the evidence to the jury.”

Appellant believes that there exists a proper basis in the present case for an appeal to this Circuit because by the Court’s order directing the transfer to defendant of the photostats which were the property of the United States and had never been the property of the defendant, the District Court did, in fact, assume jurisdiction for the purpose of trying title or right of possession. Appellant believes that the District Court went further than that and, in fact assumed jurisdiction to permanently enjoin the representatives of the Wage and Hour Division from making any use of the photostats, or any information derived therefrom, in any other proceeding of whatever character, whether civil or criminal. In doing this appellant believes that the District Court went beyond the scope of the motion to suppress; the court assumed a jurisdiction which appellant does not feel can be regarded as incidental to an interlocutory order in a criminal proceeding; the effect of the order of the court is to convert a

motion to suppress into an independent bill in equity and such order would be a final order against appellant whether the criminal proceeding is continued any further or not.

We again refer the Court to the case of *Steele v. United States*, 267 U. S. 498, where the Court directly held that the refusal to vacate a search warrant and return property at the request of a defendant was a final decree. And finally, we refer the Court to the case of *Dowling v. Collins*, 10 Fed. (2d) 62 (C. C. A. 6), *certiorari* denied, 46 S. Ct. 356, which was an original suit by a defendant in a pending criminal proceeding, seeking the return of property allegedly seized by the officers and the quashing of certain search warrants and the return and suppression of the physical evidence. In disposing of this case on appeal, the Circuit reviewed the facts shown in the criminal proceedings from which it appears that after the arrest of the defendants a motion to suppress the evidence was made in the District Court and the motion denied. Thereafter, and before empaneling a jury for a second trial, the defendants again moved the court by a written motion to quash the search warrants and to return the liquor to one of the defendants allegedly the rightful owner thereof. This motion was also denied, and thereafter the original suit was brought, which is discussed in the appeal.

After reciting the facts substantially as outlined, the court said as follows:

“We do not consider whether or not the statement in the certificate of evidence before us must be taken to mean that the written motion in the criminal case before the first trial was supplemented by an oral motion for the return of the goods seized; clearly the written motion passed on before the sec-

ond trial specifically prays for this relief. Further, it is immaterial whether or not the court erred in considering the order denying the original motion as *res adjudicata* on this broader motion. * * *

“The preliminary motion to suppress the use thereafter in that pending criminal case of certain evidence charged to have been illegally obtained is distinct and separate from the motion for the return of the goods charged to have been illegally seized; by joining them together the order denying the return of the goods is no less final, because the order denying the suppression of their use as evidence may be interlocutory.

“The parties, moreover, had a choice of remedies between the present proceedings and the motion in the criminal case for a return of the goods. They chose the latter; they submitted the issues thereon to the trial judge; on the merits they were denied the relief sought in the first instance, and were deemed barred thereby in the second attempt. That second action was final; and, if the first motion can be deemed by an agreement of the parties to have included the return of the property, the order thereon was likewise final.”

If we analyze the above quoted language carefully, we readily see that the Sixth Circuit here made a definite holding that where goods are allegedly wrongfully seized by the Government and a prosecution is started, the defendants have a choice of proceeding either by motion or by original suit for the return of the property, and whichever choice they make results in a final order from which an appeal lies. In this instance the order being against the defendant, the court held that as the order was final the defendants could appeal. We can perceive no good

reason why, had the order been in favor of the defendant and against the Government, its finality would not be the same and consequently the Government would have a right to appeal.

This position of the appellant is further strengthened by the following comment of the court in the same case:

“The reasoning of the opinion in *Perlman v. United States*, 247 U. S. 7, as well as in *Burdeau v. McDowell*, 256 U. S. 456, fully supports the conclusion that the orders on the preliminary motions and petitions in the criminal case were final and as such reviewable in this court; though entitled in that criminal case, they were no essential part of the trial therein. * * *

For the foregoing reasons, appellant urges the reversal of the action of the District Court.

Respectfully submitted,

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JAMES M. CARTER,
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V. P. LUCAS,
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No. 10782

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

HERMAN ROSENWASSER, an individual doing business
under the firm name and style of PERFECT GARMENT
COMPANY,

Appellee.

Amended and Supplemental Jurisdictional Statement
and
Points and Authorities
in
Opposition to Motion of Appellee to Dismiss.

CHARLES H. CARR,

United States Attorney;

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TOPICAL INDEX.

	PAGE
Amended and supplemental jurisdictional statement.....	1
Amended and supplemental jurisdictional statement.....	2
Statute involved	2
Appellant's points and authorities in opposition to motion to dismiss the appeal.....	3
I.	
Defendant's motion and memorandum in support thereof.....	4
II.	
Analysis of authorities cited by appellee.....	6
III.	
The order is appealable as a final order.....	11
IV.	
The order is appealable as an interlocutory order.....	17

TABLE OF AUTHORITIES CITED.

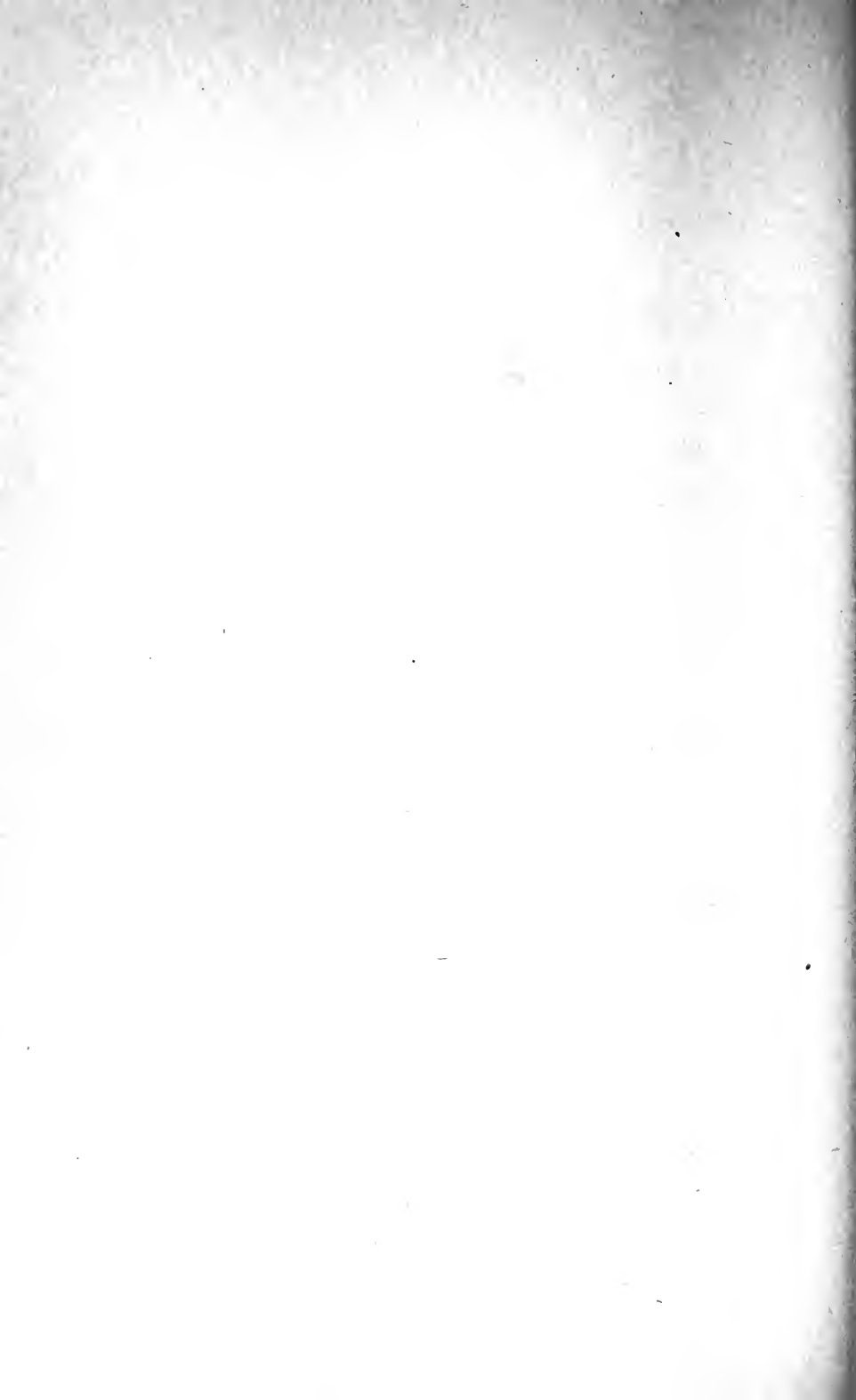
CASES.	PAGE
Albi v. Street & Smith Publications, 140 F. (2d) 311.....	18
Alexander v. United States, 201 U. S. 117.....	7
Anglo-California Bank v. Superior Court, 153 Cal. 753.....	12
Applybe v. United States, 32 F. (2d) 873.....	15
Cobbledick et al. v. United States, 309 U. S. 323.....	6, 8, 9
Cogen v. United States, 278 U. S. 221.....	5, 13, 15, 16
Ellis v. Interstate Commerce Commission, 237 U. S. 434.....	9
Frederick v. Tracy, 98 Cal. 658.....	11
Go-Bart Co. v. United States, 282 U. S. 344.....	15
Harriman v. Interstate Commerce Commission, 211 U. S. 407....	8
Hildebrand v. Superior Court, 173 Cal. 86.....	12
Hill v. United States ex rel. Wampler, 298 U. S. 460.....	10
Interstate Commerce Commission v. Brimson, 154 U. S. 447.....	8
Korematsu v. United States, 319 U. S. 432.....	6
Maresca v. United States, 266 Fed. 713.....	12
Miller v. Aderhold, 288 U. S. 206.....	9
Morgan v. Kroger Grocery & Baking Co., 96 F. (2d) 470.....	17
Perlman v. United States, 247 U. S. 7.....	8
Red Star Laboratories v. Pabst, 100 F. (2d) 1.....	12
United States v. Gowen, 40 F. (2d) 593.....	15
United States v. Herman Rosenwasser, Case No. 16152.....	14
United States v. Marquette, 270 Fed. 214.....	14, 15
Weeks v. United States, 232 U. S. 383.....	11, 12
Weinstein v. Attorney General, 271 Fed. 673.....	15
Weinstein, In re, 271 Fed. 5.....	15

STATUTES.**PAGE**

Executive Order No. 9066.....	6
Fair Labor Standards Act of 1938 (29 U. S. C. A., Sec. 201 et seq.)	2
Fair Labor Standards Act of 1938, Sec. 11(a), (C. 676, 52 Stat. 1060, 29 U. S. C., Sec. 211(a)).....	13
Interstate Commerce Act, para. 12.....	8
Judicial Code, Sec. 239.....	6
Proclamation No. 1, issued by General DeWitt.....	6
United States Code, Title 18, Sec. 546.....	2
United States Code, Title 18, Sec. 682.....	4
United States Code, Title 28, Sec. 41(a).....	2
United States Code, Title 28, Sec. 225(a)	2, 18
United States Code, Title 28, Sec. 225(b).....	2
United States Code, Title 28, Sec. 227.....	2, 4, 17, 18, 19

TEXTBOOKS.

46 American Jurisprudence, Sec. 46, p. 30.....	11
54 Corpus Juris, Sec. 1, p. 417.....	11
8 Wigmore on Evidence (3rd Ed., 1940), Secs. 2183, 2184.....	11



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Appellee.

AMENDED AND SUPPLEMENTAL JURISDIC-
TIONAL STATEMENT.

Comes now the United States of America, appellant herein, and files this its amended and supplemental jurisdictional statement and asks that the same be received and filed to correct the jurisdictional statement found on page 3 of appellant's opening brief.

Amended and Supplemental Jurisdictional Statement.

(a) The District Court had jurisdiction under the provisions of Section 41(a) of Title 28 of the United States Code.

(b) Under Section 546 of Title 18 of the United States Code the crime with which defendant was charged is cognizable in the District Court.

(c) This Court has jurisdiction by virtue of the provisions of Section 225(a) of Title 28, United States Code, to review by appeal final decisions in the District Courts.

(d) This Court has jurisdiction under and by virtue of the provisions of Section 225(b) and of Section 227 of Title 28, United States Code, to review upon appeal an interlocutory order or decree of the District Court granting an injunction.

Statute Involved.

The Fair Labor Standards Act of 1938, 29 U. S. C. A. 201 *et seq.*, in its pertinent and applicable parts, provides:

“The Administrator or his designated representatives * * * may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this act. . . .”

No. 10782

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Appellant,

vs.

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under the firm name and style of PERFECT GARMENT
COMPANY,

Appellee.

APPELLANT'S POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO DISMISS THE APPEAL.

Comes now United States of America, appellant herein, and files with the court its points and authorities in opposition to the motion to dismiss the appeal in the above entitled matter.

Appellant respectfully urges that this Honorable Court deny the motion to dismiss the appeal in the above entitled matter, and hear the case on its merits, and as authority for its position, makes the following analysis of appellee's memorandum of points and authorities in support of its motion, and presents the following points and authorities in opposition to the motion.

I.

**Defendant's Motion and Memorandum in Support
Thereof.**

Part A of defendant's memorandum is a preliminary statement which requires no comment.

Appellee in Part B of his memorandum states that the Circuit Court of Appeals has appellate jurisdiction to review only "final decisions." This, of course, is not true since the Circuit Court also has appellate jurisdiction to review certain types of interlocutory orders by virtue of 28 U. S. C. Section 227. This point will be discussed below.

Similarly, appellee is mistaken in the point urged in Part C of his memorandum that the *sentence* is the only final judgment from which an appeal lies in a criminal case. Not only are many types of orders made upon motions to suppress evidence appealable as final orders, as indicated in Part D of appellee's memorandum, but specifically orders quashing, setting aside or sustaining demurrers to an indictment under certain circumstances and orders sustaining a special plea in bar are appealable. 18 U. S. C. 682. It is not contended, of course, that the order here involved is of the types enumerated in that section. The point is simply mentioned for the purpose of demonstrating that appellee's statement that the sentence is the only final judgment from which an appeal lies is not correct.

Part D of appellee's memorandum deals with the appealability of orders made upon motions to suppress and re-

turn evidence. The motion in this case was made by the defendant after the return of the indictment, the situation which is discussed in Section 4 of Part D of appellee's brief. However, it does not follow and the authorities do not hold that, to use appellee's language, "where the motion to suppress the use of evidence in a criminal case is made by the party defendant *after the return of the indictment*, the proceeding is considered interlocutory and not a 'final decision' so that no appeal would lie from such an order. . . ."

In *Cogen v. United States*, 278 U. S. 221, upon which appellee relies, the court while holding the order there involved interlocutory and not appealable clearly recognized that under certain circumstances such an order would be final and appealable. The court said:

"Where an application is filed in that form [by motion in the criminal case], its essential character and the circumstances under which it is made will determine whether it is an independent proceeding or merely a step in the trial of the criminal case." (P. 225.)

We propose to demonstrate that the essential character of the order here involved and the circumstances under which it was made clearly establish that the proceeding became independent and more than merely a step in the trial of the criminal case so that the order is appealable as a final order.

II.

Analysis of Authorities Cited by Appellee.

One of the authorities cited by appellee is that of *Korematsu v. United States*, 319 U. S. 432. This case is of little assistance to the court in considering the present appeal, for the reason that it, like so many other authorities cited by the appellee, has to do with a matter of probation, so whatever is said in the opinion might be considered in the light of the statutes governing probation.

The facts were that the defendant had been ordered out of a defense area in accordance with Executive Order No. 9066, and Proclamation No. 1, issued by General DeWitt, and having disobeyed the order was taken before the United States District Court and found guilty and placed on probation for a term of 5 years without the court imposing any sentence.

The Circuit Court of Appeals for the Ninth Circuit was in doubt as to whether or not it had jurisdiction of the appeal under such circumstances, and certified the question to the United States Supreme Court under Section 239 of the Judicial Code.

The Supreme Court reviewed the decisions of the Circuits as well as some of its own decisions, and answered the question in the affirmative.

The next case cited by appellee, that of *Cobbledick et al. v. United States*, 309 U. S. 323, apparently has more relevancy to matters involved in the present appeal than any of the other authorities cited by the appellee in support of the motion to dismiss the appeal.

This was a case in which certiorari was granted to review the judgment of the Ninth Circuit in a case involving motions to quash subpoena *duces tecum*.

It appears from the record that the United States Grand Jury, in and for the Northern District of California, had

issued subpoenas *duces tecum* addressed to the petitioners to produce documents before the grand jury, and deeming these subpoenas to require the production of evidence which was prejudicial to the rights of petitioners, a motion to quash the petitions was filed in the District Court. Upon the motions being denied, the petitioners sought a review in the Circuit. The Circuit found itself to be without jurisdiction and dismissed the appeals, and the matter was brought before the Supreme Court because of the conflict between the Circuits.

Inasmuch as no appeal lies from the District Court to the Circuit unless there is finality in the judgment or order pronounced by the District Court, no appeal would lie to the Circuit, the Supreme Court of necessity had to discuss what was and what was not a final order.

After reviewing the policy of the law with respect to appeals, the opinion stated:

“In a certain sense finality can be asserted of the orders under review, so, in a certain sense, finality can be asserted of any order of a court. And such an order may coerce a witness, leaving to him no alternative but to obey or be punished. It may have the effect and the same characteristics of finality as the orders under review, but from such a ruling it will not be contended there is an appeal.”

The above is a quotation from the case of *Alexander v. United States*, 201 U. S. 117, and the basis for the holding is, as said by the court, that to allow an appeal under such circumstances would halt the orderly progress of a cause and consider incidentally a question which has happened to cross the path of such litigation.

The opinion goes on to say that adequate protection is afforded if the person refuses to obey the order and the

court punishes for contempt, then the judgment becomes personal to the witness and he may have his appeal.

The court also analyzed in the *Cobbledick* case its ruling in *Perlman v. United States*, 247 U. S. 7, in which certain exhibits owned by Perlman had been impounded in court during a patent suit, and the United States Attorney had attempted to have these exhibits produced before the grand jury, and Perlman had petitioned the District Court to prohibit their use invoking his constitutional privilege of not giving evidence against himself, and when the petition was denied Perlman sought a review by the Supreme Court and the United States Attorney claimed that no appeal would lie because the action of the District Court was not final, but interlocutory. In holding that it was a final order, the court said that if the production of the documents were allowed, Perlman's constitutional rights would be then invaded and he could only protect himself by separate proceeding to prohibit their forbidden use, and the District Court's order was, under the circumstances, final.

The great distinguishing feature pointed out in the *Cobbledick* case is, however, that different rules must be promulgated under different sections, and then point out there is one class of cases dealing with the duty of witnesses to testify which prevents differentiating different circumstances and refer to those cases arising under paragraph 12 of the Interstate Commerce Act, whereby statutory proceedings may be brought in the District Court to compel testimony from persons who have refused to make disclosures before the Interstate Commerce Commission. In these cases the orders of the District Court directing the witness to answer have been held final and reviewable. *Interstate Commerce Commission v. Brimson*, 154 U. S. 447; *Harriman v. Interstate Commerce Commission*, 211

U. S. 407; *Ellis v. Interstate Commerce Commission*, 237 U. S. 434.

The significant thing about the *Cobbledick* case is that the court distinctly points out that differences as well as resemblances must be taken into consideration in applying a ruling to each set of facts. In other words, the court is at great pains to say that not every case can be determined by merely seeking out some prior decision which has some resemblance to the facts in the case to be decided, and holding that the resemblance compels a ruling identical with the prior holding, and it is this point which appellant has attempted to emphasize in the present appeal.

The *Cobbledick* case said as follows:

“Such cases were actually considered in the Alexander case, and deemed to rest ‘on statutory provisions which do not apply to the proceedings at bar, and, while there may be resemblances to the latter, there are also differences.’ The differences were thought controlling. Appeal from an order under Sec. 12 was again here in the Ellis case *supra*, fully argued in the brief, and again differentiated from a situation like that in the Alexander case. ‘No doubt’ was felt that an appeal lay from the district Court’s direction to testify.”

The next case, that of *Miller v. Aderhold*, 288 U. S. 206, involved the question of the rights of a petitioner who had been placed on probation. The petitioner was convicted upon his plea of guilty of the crime of stealing from the United States Mails, and by order of the court sentence was suspended and he was discharged from custody of the Marshal. Thereafter, the petitioner was sentenced by another judgment to 4 years in prison. A mo-

tion to vacate that judgment was denied, and a petition for a writ of habeas corpus was filed in the Federal District Court of Georgia, that being the place of the prisoner's confinement.

A careful reading of this case discloses nothing which would be of assistance to this court in determining the appeal or the motion now before the court.

The next case cited by the appellee in his motion to dismiss is that of *Hill v. United States ex rel. Wampler*, 298 U. S. 460.

This case also is one in which certain questions were certified to the United States Supreme Court by the Third Circuit, and involved questions of habeas corpus. It throws little, if any, light upon the question now before the court.

The facts in the case, as disclosed by the opinion, are that the petitioner, Wampler, was convicted in the United States District Court for the District of Maryland, and judgment was pronounced. That he paid a fine of \$5,000.00, and 18 months in the penitentiary on each count of the indictment, said terms of imprisonment to be computed as beginning on a certain day and the fines to be cumulative and the terms of imprisonment to run concurrently.

In writing up the judgment as pronounced by the court, the clerk made somewhat of a variance and the result was that the commitment was broader than the judgment pronounced by the court.

Three questions were propounded to the United States Supreme Court, and the answers to the three questions in no way would enlighten this court in its consideration of the present appeal.

III.

The Order Is Appealable as a Final Order.

The general rule is that a plenary action is the proper procedure by which to recover property to which a party has the immediate right of possession. Ordinarily the proper action is replevin or its modern counterpart, claim and delivery. 54 Corp. Jur. (Replevin, Sec. 1 *et seq.*) 417; *Fredericks v. Tracy*, 98 Cal. 658.

Prior to *Weeks v. United States*, 232 U. S. 383, property held by prosecuting authorities for use as evidence in the prosecution of a criminal case could not be recovered by the person claiming the right to its immediate possession.

8 Wigmore on Evidence (3rd ed. 1940), Sec. 2183, 2184.

46 Am. Jur. (Replevin, §46) 30.

The *Weeks* case established the rule that if property was seized in violation of the Fourth or Fifth Amendments to the Constitution solely for the purpose of being used as evidence in a criminal case it might be recovered either by timely motion in the criminal case or by a summary proceeding against the holder of the property, rather than by an independent action.

It is obvious that in these exceptions countenanced by the *Weeks* case the court does not purport to try title to or right to possession of the property. It simply exercises jurisdiction over its officers by directing them to return the property which because of the manner in which it was seized may not be used for the only purpose for

which it was seized, to wit, as evidence in the criminal case. See *Maresca v. United States*, 266 Fed. 713.

Where the property has not been seized solely for use as evidence in the prosecution of a criminal case an order which in addition to suppressing the use of the evidence in that case directs its return goes further than is justified by the theory of the *Weeks* case and the proceeding is thereby converted into an independent proceeding, the purpose of which is to try title or the right to possession of the property. Such an order, affecting as it does the rights of the parties to the possession of the property independently of its use as evidence in the criminal case, must be deemed a final order and therefore appealable. Cf. *Red Star Laboratories v. Pabst*, 100 F. (2d) 1 (CCA 7); *Hildebrand v. Superior Court*, 173 Cal. 86; *Anglo-California Bank v. Superior Court*, 153 Cal. 753.

Applying these principles to the facts involved herein it is clear that the order did more than direct the return of property which had been illegally seized solely for use as evidence in a criminal case. There is no evidence at all that that was the purpose of the seizure. On the contrary, from the facts stated in the appellee's affidavit in support of his motion to suppress the evidence it is apparent that the officers of the Wage-Hour and Public Contracts Divisions of the United States Department of Labor secured the evidence during the course of an investi-

gation being conducted by them in accordance with Section 11(a) of the Fair Labor Standards Act of 1938.¹

A second basis for holding that the order in question was final and therefore appealable is that it affected the rights of parties who are not party to the litigation. The Supreme Court recognizes that orders which affect the rights of other parties are not interlocutory.

In *Cogen v. United States*, 278 U. S. 221, the court said:

“The orders made upon such applications [motion to suppress evidence made in the course of the criminal prosecution so far as they affect the rights only of parties to the litigation, are interlocutory.” [p. 224.]
(Underscoring added.)

The order in the instant case, even had it been confined solely to the evidence to which the motion was directed, would have affected the rights of parties who are not involved in the litigation. The motion [R. p. 32] was for an order directing that plaintiff's exhibits and exhibits for identification in Case No. 16152, entitled *United*

¹C. 676, 52 Stat. 1060, 29 U. S. C. Sec. 211(a):

“The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this Act, or which may aid in the enforcement of the provisions of this Act. . . .”

States of America v. Herman Rosenwasser, which is a different case from that in which the motion in question was made, be suppressed and excluded as evidence in the trial of the instant case. Note that the motion did not ask, as indeed it could not properly ask, for the return of that evidence. It is clear that these exhibits and exhibits for identification were at the time of the motion in the custody and possession of the Clerk of the District Court of the United States. Insofar as the order directed the return of this property it dealt with the right of possession of the clerk who is not a party to the action and therefore the proceeding became independent in character and the order a final one from which an appeal lies.

See *United States v. Marquette*, 270 Fed. 214 (CCA, 9), in which this court by the following language indicated that under such circumstances an order would be final and appealable:

“The court below did not assume jurisdiction for the purpose of trying title or right of possession, but simply to prevent the use of the property wrongfully seized as evidence upon the trial of the criminal charge, and the order directing the return of the property to avoid that result is no more final or appealable than would be any other order excluding testimony on the trial.”

In going beyond the scope of the relief requested by appellee's motion to suppress evidence the order substantially affected the rights of still other parties to the pos-

session of property which was not the subject of appellee's motion. The order directed the officers and agents of the U. S. Department of Labor, Wage and Hour Division "and/or any other person obtaining information or data" from the documents to return the same forthwith to the defendant.

It is well settled that the fact that the "United States" is a party to the action does not give the court jurisdiction over the officers and employees of the Wage and Hour Division or power to make an order directing the return of property in their possession or to which they have the right to possession." *Applybe v. United States*, 32 F.(2d) 873 (CCA 9).

United States v. Gowen, 40 F.(2d) 593 (CCA 2) reversed upon a different interpretation of the facts in *Go-Bart Co. v. United States*, 282 U. S. 344.

In re Weinstein, 271 Fed. 5, affirmed as *Weinstein v. Attorney General*, 271 Fed. 673 (CCA 2).

Therefore, when the court purported to adjudicate the right of possession to property as between appellee and officers and agents of the Wage-Hour Division, U. S. Department of Labor, it converted the proceeding into an independent proceeding and its order was final and appealable. Cf. *Cogen v. United States*, 278 U. S. 221; *United States v. Marquette*, 270 Fed. 214 (CCA 9), *supra*.

Finally the court achieved the same result and made its order a final one in an independent proceeding by restraining the United States and its officers and agents, from using the property in question "in any proceeding of any kind or character whatsoever against this defendant."

The Supreme Court in the *Cogen* case clearly indicated that the order therein considered was deemed interlocutory because it dealt with the question of suppressing the evidence as an integral part of and not distinct from the general litigation. The court said:

"In essence the motion resembles others made before or during the trial to secure or to suppress evidence, such as applications to suppress a deposition . . . ; to compel the production of books or documents . . . ; for leave to make physical examination of plaintiff . . . ; or for a subpoena duces tecum The orders made upon such applications so far as they affect parties to the litigation are interlocutory."

This theory had already been recognized by this court in the *Marquette* case when it held the order there before it interlocutory because the court assumed jurisdiction "merely to prevent the use of the property wrongfully seized as evidence upon the trial of the criminal charge." Here, as has been indicated, the court went much further and purported to prevent the use of the evidence "in any proceeding of any kind or character whatsoever against this defendant."

IV.

The Order Is Appealable as an Interlocutory Order.

Having demonstrated that the order is not simply only for the suppression and return of evidence as an incident to the prosecution of the criminal case but is independent and therefore final and appealable, appellant will also demonstrate that that portion of the order which enjoins the United States of America, its officers and agents, from using any of the property in question in any proceeding of any kind or character whatsoever² is appealable as an interlocutory order in accordance with 28 U. S. C. Sec. 227.

28 U. S. C. Sec. 227 provides, insofar as material here:

“Where, upon a hearing in a District Court, or by a judge thereof, in vacation, an injunction is granted . . . by an interlocutory order or decree . . . an appeal may be taken from such interlocutory order or decree to the Circuit Court of Appeals; . . .”

Prior to 1925 this section applied only to appeals from the orders therein mentioned made upon a hearing *in equity*. The amendment of that year deleted the words “in equity” and it has been held that to be appealable under this section the order need not be one made in a “hearing in equity.” *Morgan v. Kroger Grocery & Baking Co.*, 96 F.(2d) 470 (CCA 8, 1938).

²The order in its entirety is found in the Transcript of Record, pp. 39-40 and the injunctive portion thereof reads as follows:

“ . . . and the United States of America, and/or its officers and agents are barred from using any such invoices, bills, records, data or information or, any matter obtained therefrom directly or indirectly in any proceeding of any kind or character whatsoever against this defendant; and, . . .”

This court held the section applicable to an appeal from an interlocutory injunction granted in an action at law for damages and it is respectfully urged that under that holding the order in this case is appealable under Section 227. *Albi v. Street & Smith Publications*, 140 F.(2d) 311 (CCA 9). In that case Albi filed suit in the State Court for recovery of damages based upon an alleged libelous publication and the two defendant publishing companies filed a motion in the State Court for the removal of the cause to the Federal Court on the ground that there was a separable controversy as to the non-resident defendants. This motion to transfer the cause to the Federal Court was granted and thereafter the plaintiff filed a motion in the Federal Court to remand the cause back to the State Court. This motion was denied and as a part of the order denying the motion to remand the Federal Court enjoined further prosecution of the cause in the State Court. This court in a footnote to its opinion stated as follows:

“Insofar as the order enjoins further prosecution of the cause in the State Court it is appealable under Section 129 of the Judicial Code 28 U. S. C. A. Sec. 227. See *Borden Co. v. Zumwalt*, 9 Cir., 120 F.(2d) 69, and authorities there cited.”

Having shown that the order appealed from is appealable as a final order under 28 U. S. C. Sec. 225 because it is not merely an order suppressing and directing the return of evidence as an incident to the criminal prosecution but is independent of that prosecution in that it purported to dispose of property which had not been seized simply for use in a criminal prosecution; in that it

purported to try the right of possession to the property as against the Clerk of the District Court and as against officers and agents of the Wage-Hour Division, U. S. Department of Labor, none of whom were parties to the litigation, and in that it purported to enjoin the use of the property not only in the criminal prosecution but in any proceeding of any kind whatsoever; and having also shown that the injunctive portion of the order is an appealable order under 28 U. S. C. Sec. 227, appellant respectfully urges this court to deny the motion to dismiss the appeal and to hear the appeal on its merits.

Respectfully submitted,

CHARLES H. CARR,

United States Attorney;

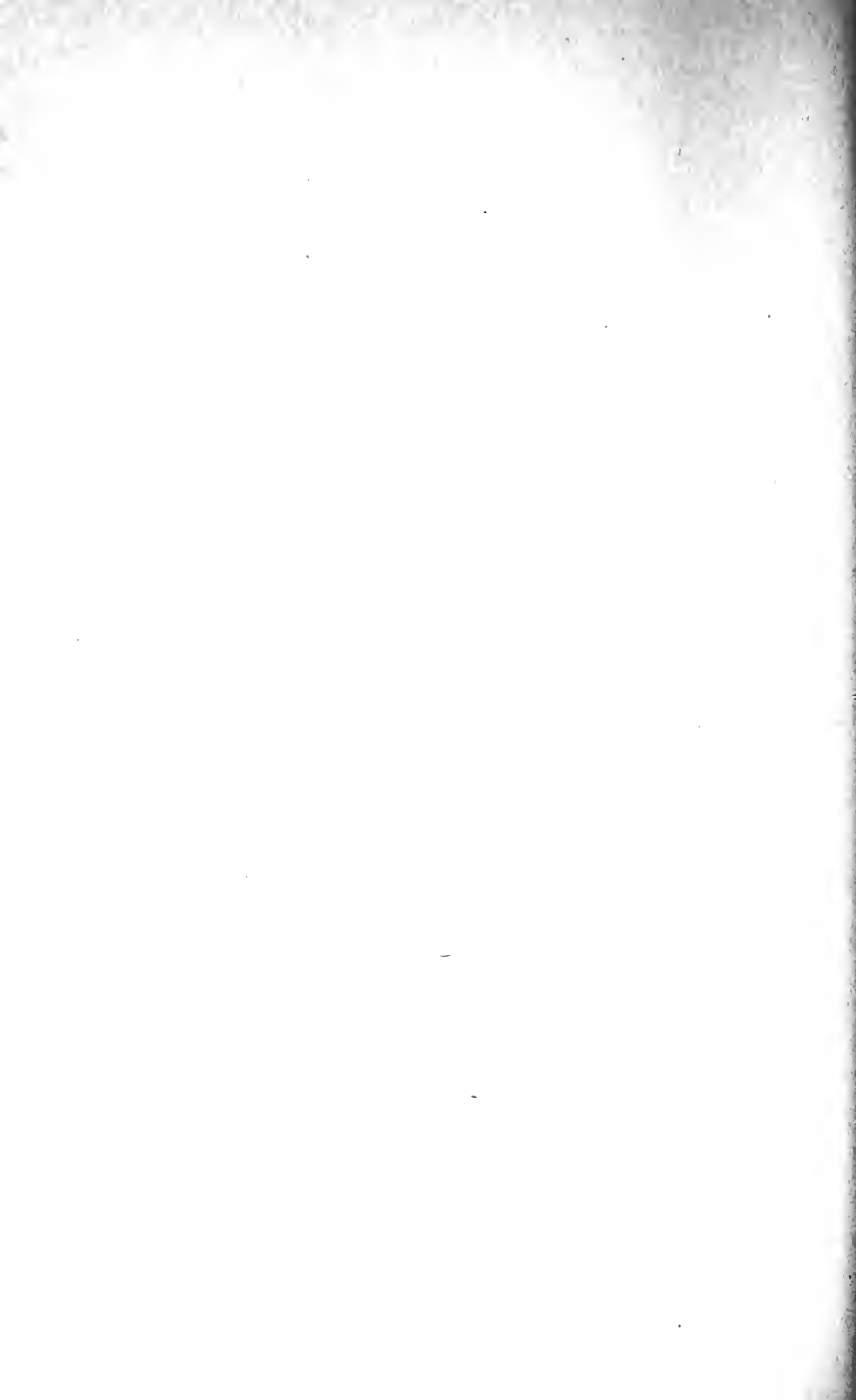
JAMES M. CARTER,

Assistant U. S. Attorney;

V. P. LUCAS,

Assistant U. S. Attorney;

Attorneys for Appellant.



No. 10783

United States
Circuit Court of Appeals
For the Ninth Circuit.

16

ELMER H. MATEAS,

Appellant,

vs.

FRED HARVEY, a corporation,

Appellee.

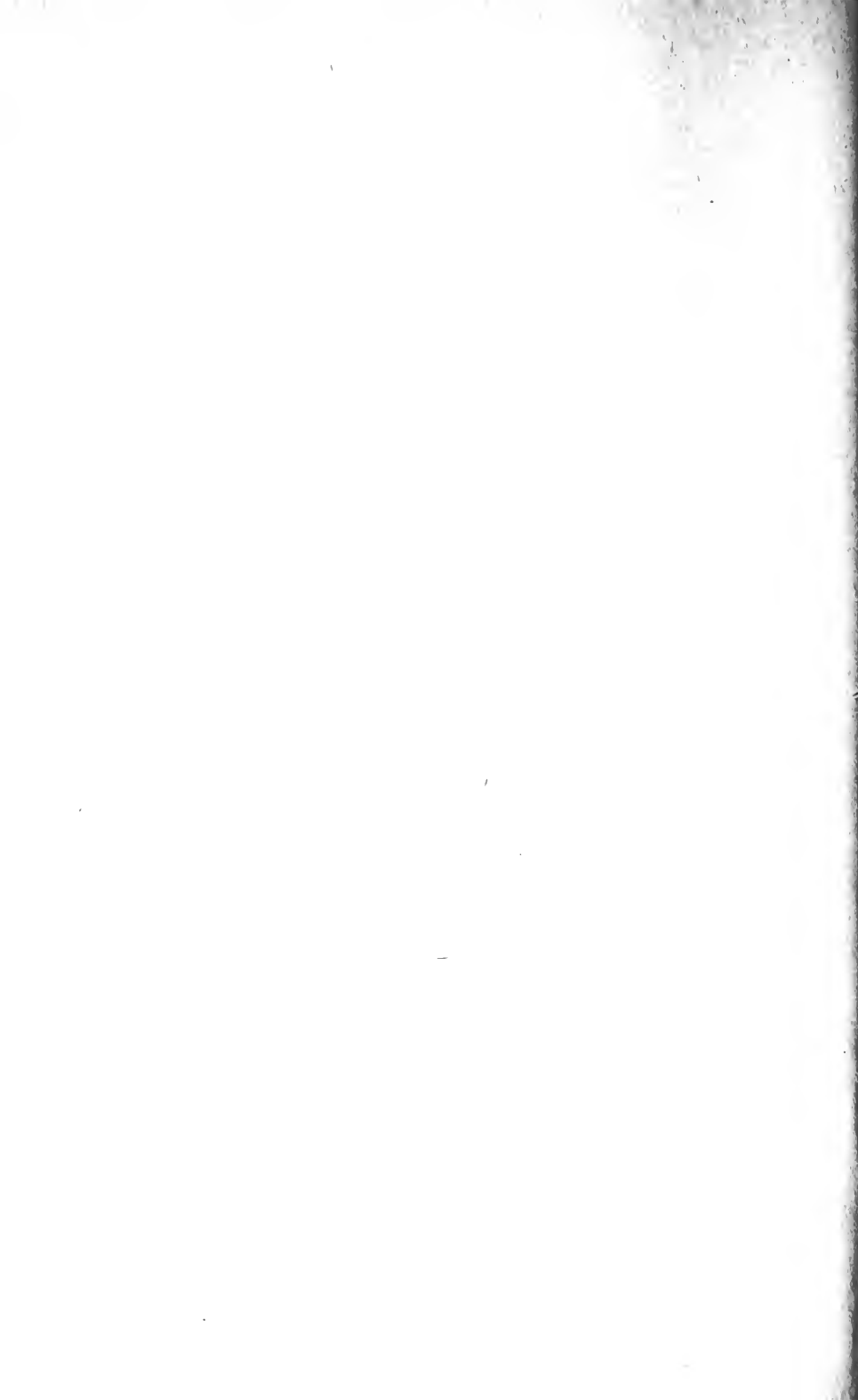
Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

JUL 13 1944

~~PAUL P. O'BRIEN,~~
CLERK



No. 10783

United States
Circuit Court of Appeals
For the Ninth Circuit.

ELMER H. MATEAS,

Appellant,

vs.

FRED HARVEY, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Amended Complaint	16
Answer to Amended Complaint	23
Appeal:	
Bond for Costs on	31
Certificate of Clerk of District Court to Transcript of Record on	34
Designation of Record on	33
Notice of	30
Statement of Points Upon	139
Bond for Costs on Appeal	31
Bond on Removal	10
Certificate of Clerk of District Court to Tran- script of Record on Appeal	34
Certificate of Clerk of Superior Court	14
Complaint, Amended	16
Complaint for Damages for Personal Injuries.	2
Designation of Record on Appeal	33
Judgment of Dismissal	29

Index	Page
Minute Orders:	
(District Court) entered Jan. 18, 1944....	27
(Superior Court) entered Sept. 16, 1943...	12
Motion to Remove to Federal Court	5
Names and Addresses of Attorneys	1
Notice of Appeal	30
Order for Removal	13
Order for Transmittal of Original Exhibits ...	34
Petition for Removal to Federal Court	6
Statement of Points Upon Appeal	139
Transcript of Testimony and Proceedings on Trial	36
Witnesses for Plaintiff:	
Bradley, John	
—direct	127
Ennis, Emmet Myron	
—direct	37
—cross	47
—redirect	48
—recalled, direct	126
Mateas, Elmer H.	
—direct	50
Mateas, June	
—direct	74
—recalled, direct	96
—cross	101

Index

Page

Witnesses for Plaintiff—(Continued):

Rayle, Mrs. Alice

—direct 106

Sloan, Leigh E.

—direct 85

—cross 90

—redirect 94

Vogel, Mrs. Ella W.

—direct 131



NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

WALTER GOULD LINCOLN,

Suite 1113 Lincoln Bldg.,
Los Angeles, Calif.

For Appellee:

SCHELL & DELAMER,

Suite 1212, 215 W. 7th St.,
Los Angeles 14, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the Superior Court of the State of California
In and for the County of Los Angeles

No. 485,744

ELMER H. MATEAS,

Plaintiff,

vs.

FRED HARVEY, a corporation, DOE No. 1; DOE
No. 2; DOE, No. 3,

Defendants.

COMPLAINT FOR DAMAGES FOR
PERSONAL INJURIES

Plaintiff complains of the defendant and alleges:

I.

That Fred Harvey, a corporation is now and was at all times mentioned herein, a corporation doing business in the State of California.

II.

That on or about June 17th, 1942, the plaintiff rented from the defendant a certain mule reported to be named "Chiggers" for the purpose of riding said mule in a party accompanied by a guide furnished by the defendant; that the said mule was selected by the defendant for the plaintiff.

That plaintiff had no knowledge of any of the peculiarities of the mule, and plaintiff was not accustomed to riding this said mule.

III.

That on the same day the Plaintiff did ride the said mule and the said mule did buck and jump and throw the plaintiff off, and the plaintiff [2] did strike the base of his spine upon the pavement and did receive a fracture of the right transverse process of the 12th dorsal vertebra.

IV.

That by reason of the same the Plaintiff did suffer continuous pain and discomfort at the small of his back and right hip. That such pain continues even to the present time.

V.

That by reason thereof he has been obliged to and has remained away from his work as a plastering contractor, and has been obliged to and has received hospitalization and the attention of physicians.

VI.

That by reason of the said injury to his spine and hip the plaintiff has been damaged in the sum of \$5,000.00, and has paid, or been obligated to pay to said physicians the sum of \$370.50; and has lost an additional sum of \$1785.00 by reason of his absence from his work.

VII.

That no part of any of said sums has been paid, and the whole thereof is now unpaid to the Plaintiff.

Wherefore Plaintiff prays for judgment against the defendant in the sum of \$7155.50, and interests and costs.

WALTER GOULD LINCOLN,
Attorney for Plaintiff. [3]

State of California,
County of Los Angeles—ss.

Elmer H. Mateas being by me first duly sworn deposes and says: that he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief; and as to those matters that he believes it to be true.

ELMER H. MATEAS.

Subscribed and sworn to before me this 26 day of May, 1943.

[Seal] G. M. PAULL,
Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires June 22, 19 ...

[Endorsed]: Filed May 28, 1943. J. F. Moroney,
County Clerk, By A. Ryan, Deputy.

[Endorsed]: Filed Oct. 1, 1943. Edmund L.
Smith, Clerk, By John A. Childress, Deputy Clerk.

[4]

[Title of Superior Court and Cause.]

NOTICE OF MOTION TO REMOVE TO
FEDERAL COURT

To Plaintiff Above Named, and

To Walter Gould Lincoln, Esq., His Attorney:

You and Each of You Will Please Take Notice that Fred Harvey, a corporation, one of the defendants in the above entitled action, will on the 13th day of September, 1943, at the hour of 9:30 A. M., or as soon thereafter as counsel can be heard, move the above entitled court in Department 35 thereof, located on the 20th Floor, City Hall, Los Angeles, California, for its order removing said cause to the District Court of the United States for the Southern District of California, Central Division, in accordance with the petition and bond heretofore served and filed in said court by said defendant Fred Harvey, a corporation.

Dated at Los Angeles, California, this 2nd day of September, 1943.

SCHELL & DELAMER,
By GERALD F. H. DELAMER,
Attorneys for defendant Fred
Harvey, a corporation. [5]

(Affidavit of Service by Mail.)

[Endorsed]: Filed Sept. 2, 1943. J. F. Moroney,
County Clerk, By A. Ryan, Deputy.

[Endorsed]: Filed Oct. 1, 1943. Edmund L.
Smith, Clerk, By John A. Childress, Deputy Clerk.

[6]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL TO FEDERAL
COURT

To the Honorable, the Superior Court of the State
of California, in and for the County of Los
Angeles:

The petition of Fred Harvey, a corporation, one
of the defendants in the above entitled action, re-
spectfully shows as follows:

I.

That petitioning defendant is a corporation or-
ganized and existing under the laws of the State of
New Jersey, and at the time of the commencement
of this action and ever since has been and still is a
resident of and citizen of the State of New Jersey.

II.

That said cause is a civil action, to-wit, an action
for damages on account of personal injuries alleged
to have been sustained by the plaintiff, Elmer H.
Mateas, as a result of being thrown from a mule
rented to him by your petitioner.

III.

That the controversy involved in this action is
between [7] citizens of the United States residing
in different states of the United States, to-wit, be-
tween the plaintiff, Elmer H. Mateas, who resides
in and is a citizen of the State of California, on the
one hand, and the defendant, Fred Harvey, a corpo-
ration, who is a citizen of the State of New Jersey
on the other hand.

IV.

That the matter in dispute in this action exceeds in value the sum of \$3,000.00 exclusive of costs, as appears from the allegations of the complaint filed herein, which allegations are incorporated herein by reference with the same force and effect as if fully re-alleged and restated herein, for the purpose of showing the amount in controversy.

V.

That your petitioning defendant, Fred Harvey, a corporation, desires to remove said cause before the trial thereof into the District Court of the United States of America in and for the Southern District of California, Central Division.

VI.

That this petitioning defendant, Fred Harvey, a corporation, hereby presents a good and sufficient bond as provided by the statutes in such cases, that said petitioning defendant will enter into such District Court of the United States, within thirty days from the filing of this petition, a certified copy of the record in this suit and conditioned for the payment of all costs which may be awarded in this action by the said Court if the said District Court holds that said action was wrongfully and improperly removed thereto.

VII.

That this petitioning defendant was served with summons and complaint in the above entitled action in Los Angeles, County of Los Angeles, State of

California, on the 23rd day of August, 1943, and that said petitioning defendant's time to plead to said summons and complaint has not expired as of the date hereof. That no appearance in said action has heretofore been made by this petitioning defendant. [8]

VIII.

That your petitioner was the owner of the mule referred to in plaintiff's complaint at the time of the renting thereof to the plaintiff and at the time of the happening of the accident referred to in plaintiff's complaint, and that no other person had any right, title or interest in or to said mule or rented the same to the plaintiff.

IX.

That a separable controversy exists between the plaintiff and your petitioning defendant in connection with the alleged liability on the part of your petitioner as the result of the renting of said mule by your petitioner to the plaintiff.

X.

That your petitioner is informed and believes and upon such information and belief alleges that the defendants other than this petitioning defendant named in said complaint, to-wit, Doe No. 1, Doe No. 2, and Doe No. 3, and each of them, are not necessary or proper parties to this action, and that said fictitiously named defendants, and each of them, have been fraudulently joined as defendants in this action for the purpose of attempting to prevent a

removal of this cause to said United States District Court, and that your petitioner is informed and believes and therefore alleges that no service of summons or complaint has been attempted or has been had upon such fictitiously named defendants, or any of them.

Wherefore, said petitioning defendant prays that said Superior Court proceed no further herein except to make the order of removal of said cause, as required by law, from said Superior Court to said United States District Court, and to accept and approve the said statutory bond in connection therewith, which is herewith presented to said Superior Court, and to direct a transcript of the record herein to be made and certified by the Clerk of said Superior Court, as provided by law, and your petitioner will ever pray.

FRED HARVEY, a corporation,
By SCHELL & DELAMER,
By GERALD F. H. DELAMER,
Its Attorneys,
Petitioner. [9]

SCHELL & DELAMER,
By GERALD F. H. DELAMER,
Attorneys for petitioning defendant.

(Duly Verified by Gerald F. H. Delamer.) [10]

(Affidavit of Service by Mail.)

[Endorsed]: Filed Sept. 2, 1943. J. F. Moroney,
County Clerk, By A. Ryan, Deputy.

[Endorsed]: Filed Oct. 1, 1943. Edmund L.
Smith, Clerk, By John A. Childress, Deputy Clerk.

[Title of Superior Court and Cause.]

BOND ON REMOVAL

Know All Men by These Presents, That Indemnity Insurance Company of North America, a corporation organized and existing under the laws of the State of Pennsylvania, and duly qualified to transact a general surety business in the State of California, is held and firmly bound unto Elmer H. Mateas, in the sum of Five Hundred (\$500.00) Dollars, lawful money of the United States of America, for which payment well and truly to be made it binds itself, its successors and assigns, jointly and severally, firmly by these presents.

The Condition of the Above Obligation Is Such That,

Whereas, the Defendant in the above entitled action has filed its petition in the Superior Court of the State of California in and for the County of Los Angeles, for the removal of said action now pending therein to the District Court of the United States, Southern District of California, Central Division,

Now, Therefore, if the said Fred Harvey, a corporation, shall enter in the District Court of the United States for the Southern District of California, Central Division within thirty (30) days from the date of filing said petition, a certified copy of the record in said suit, and shall well and truly pay all costs that may be awarded there- [12] in by said District Court of the United States for the Southern District of California, Central Division if

said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise to remain in full force and virtue.

Signed, sealed and dated this 2nd day of September, 1943.

[Seal]

INDEMNITY INSURANCE
COMPANY OF NORTH
AMERICA,

By E. F. HOLMES,
Attorney in Fact.

The foregoing bond is hereby approved as to form and sufficiency of Surety this 3rd day of September, 1943.

H. C. SHEPHERD,
Court Commissioner of Los
Angeles County.

Bond Approved Sept. 13, 1943.

ALFRED L. BARTLETT,
Judge.

State of California,
County of Los Angeles—ss.

On this 2 day of September in the year one thousand nine hundred and forty three before me F. D. Lanctot, a Notary Public in and for the County of Los Angeles personally appeared E. F. Holmes known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the Indemnity Insurance Company of North America, and acknowledged to me that he sub-

scribed the name of the Indemnity Insurance Company of North America thereto as principal, and his own name, as Attorney-in-fact.

[Seal] F. D. LANCTOT,

Notary Public in and for the County of Los Angeles, State of California.

My Commission Expires 8-24-47.

The Premium Charged for this Bond is \$10.00 for the term thereof.

[Endorsed]: Filed Sept. 2, 1943. J. F. Moroney, Couty Clerk, By A. Ryan, Deputy.

[Endorsed]: Filed Oct. 1, 1943. Edmund L. Smith, Clerk, By John A. Childress, Deputy Clerk.

[13]

In the Superior Court of the State of California
In and for the County of Los Angeles

Honorable Alfred L. Bartlett, Judge Presiding;
Department No. 35, September 13, 1943.

No. 485744

[Title of Cause.]

(Entered September 16, 1943.)

Petition and Bond of Defendant Fred Harvey, a Corporation, for removal to the United States District Court, Southern District, Central Division, and Demurrer of same Defendant to Complaint come on for hearing; Schell and Delamer by S. McHaffie appearing as attorney for Defendant named.

Petition is granted; Bond approved. Said Demurrer is ordered off calendar.

[Endorsed]: Filed Oct. 1, 1943. Edmund L. Smith, Clerk, By John A. Childress, Deputy Clerk.

[14]

[Title of Superior Court and Cause.]

ORDER FOR REMOVAL

This cause coming on for hearing upon petition and bond of Fred Harvey, a corporation, one of the defendants herein, for an order transferring this cause to the District Court of the United States for the Southern District of California, Central Division, and it appearing to the court that the said defendant has filed its petition for such removal in due form of law and that said defendant has filed its bond duly conditioned with good and sufficient sureties as provided by law, and that said defendant has given the plaintiff due and legal notice thereon and it appearing to the court that this is a proper cause for removal to said District Court, said petition and bond are hereby accepted and approved, and

It Is Hereby Ordered And Adjudged that this cause be and it is hereby removed to the United States District Court for the Southern District of California, Central Division, and that the Clerk is hereby directed to make up and certify the record in said cause for transmission to said court forthwith.

Done in open court this 13th day of September, 1943.

ALFRED L. BARTLETT

Judge.

[Endorsed]: Filed Sep. 13, 1943. J. F. Moroney, County Clerk. By J. D. John, Deputy.

[Endorsed]: Filed Oct 1, 1943. Edmund L. Smith, Clerk. By John A. Childress, Deputy Clerk.
[15]

CERTIFICATE OF CLERK OF SUPERIOR
COURT

State of California,
County of Los Angeles—ss.

No. 485744

I, J. F. Moroney, County Clerk and Clerk of the Superior Court in and for the County and State aforesaid, do hereby certify the foregoing copies of documents consisting of the

Complaint, Demurrer, Notice of hearing petition for removal, Petition for Removal, Bond on Removal, Minute Order of September 13, 1943 granting petition for removal, and written Order for Removal to the District Court of the United States for the Southern District of California (Central Division), in the action of
Elmer H. Mateas vs. Fred Harvey, a corporation, et al., to be a full, true and correct copy, of all of

the original documents on file and/or of record in this office in the above-entitled action to and including the date the motion was granted for Removal to the District Court of the United States, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 1st day of October, 1943.

(Seal) J. F. MORONEY,

County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles,

(By) M. B. WARD,

Deputy

[Endorsed): Filed Oct. 1, 1943. Edmund L. Smith, Clerk. By John A. Childress, Deputy Clerk.

[16]

District Court of the United States for the Southern District of California, Central Division.

No. 3179-Y Civ.

ELMER H. MATEAS,

Plaintiff,

vs.

FRED HARVEY, a corporation, et al.,

Defendants.

AMENDED COMPLAINT

Leave of Court having been granted, Plaintiff hereby amends his complaint and alleges:

I.

That the Fred Harvey, a corporation, is now and was at all times herein mentioned, a corporation organized and existing under the laws of the State of New Jersey, and doing business in the States of Arizona and California.

II.

That the Grand Canyon of the Colorado is in the State of Arizona aforesaid, and at and on a portion of the south rim of the said Canyon, the said defendant corporation has now, and has maintained, operated and owned for at least five years last past and immediately prior to the beginning of this action, an all year round resort, known as El Tovar.

III.

That the Colorado River runs in a general easterly and westerly direction at the base of the said south Rim, which is about a mile [17] above the surface of the said river; that as one of the attractions and inducements to the excursionist to patronise the said El Tovar the said defendant corporation has owned, operated and maintained for the same period of time two trails leading from the said south rim to the said river, one known as the Phantom Ranch Trail and the other known as the "Bright Angel Trail".

That the said "Bright Angel Trail" is about six miles in length, and very tortuous and steep, with many sharp turns and narrow pathways, all of which conditions were well known to defendant corporation on June 17th, 1942 but unknown to the Plaintiff herein.

IV.

That during the said entire period the said defendant corporation has maintained a string of mules on each of said trails for the purposes of

(1) On the Phantom Ranch Trail, to carry supplies to and across the said Colorado River to a vacationing resort known as "Phantom Ranch";

(2) For the purpose of carrying excursionists—one to a mule—on the said "Bright Angel Trail" in order to go from El Tovar down to the Colorado River, and return.

That the Phantom Ranch string of mules has always been composed of pack mules only, carrying no persons; that the Bright Angel Trail mules do

not carry any packs, except a small amount which may be necessary to carry lunches for said excursionists, but, on the contrary the mules provides for service on such trail, are used exculsively by persons, male and female, to ride down and up, as heretofore set forth, accompanied by a guide selected by defendant corporation, and that for such experience, excursion, and ride each of said persons pays a fee to the defendant corporation, which fee has been established by it.

That the Plaintiff is informed and believes and therefore alleges that the pack mules so used on the Phantom Ranch Trail are used on that trail for a period of two years, and then are transferred to the "Bright Angel Trail". [18]

That on or about June 17, 1942, the Plaintiff, desiring to compose one of a party who would make the Bright Angel *Trial* trip, personally presented himself to defendant corporation, and paid in advance to defendant corporation the required fee so established for such excursion, or trip. That at said time and place a string of mules was provided for the use of the plaintiff and the various other persons who were in the party to take, *and who were in the party to take*, and who did take, said trip and said excursion, and such string of mules was presided over and guided by Bob Ennis, who had such mules under his sole control, charge and management.

VI.

That the said Bob Ennis was at such time and place an employee of said defendant corporation and acting within the scope of his employment. That he had been in such employment, as plaintiff is informed and believes and therefore alleges, for a period of at least five or six years continuously, and immediately prior to, and on said date in 1942. That during that entire period he also had charge of, and control and management of, all the mules used on both of said trails.

Plaintiff is informed and believes and therefore alleges that one of said mules so presented by defendant corporation for the use of said excursionists on said trip in July, 1942, was named "Chigger" or "Jigger" and that this occasion was the first time that this mule had ever been down, or up the "Bright Angel Trail" and was the first time the said mule had been down, or up said trail in the year 1942, and was the first time said mule had carried any excursionist on his back.

That plaintiff is informed and believes and therefore alleges, that previous to said July 17, 1942, the said mule had been by defendant corporation used exclusively for a period of approximately two years on the pack train going from said north rim on the Phantom Ranch Trail, and that said mule had not during that period carried persons, but always carried a pack, or merchandise of some character, or description. [19]

That said mule was not accustomed to carrying persons, or any person.

VII.

That none of the facts alleged in the immediately foregoing paragraphs Nos. 1, 4, and VI were known to this plaintiff, nor was the plaintiff informed of any of such conditions prior to the time of the injury complained of.

VIII.

That at the said time and place the plaintiff did informe said defendant corporation that he had never been down the Bright Angel Trail before; had never ridden a mule, was not an experienced rider either of horses or mules, and he desired a suitable, safe and fit animal be selected for him by the guide. That said guide did select such animal, namely, the mule named "Jiggers" or "Chiggers" and placed said mule as the last one in the string. That plaintiff had not seen any of said mules before said June 17, 1942.

IX.

That defendant corporation then and there well knew, or should have known that the said mule was not at all suitable, or fit to be used for the purpose for which it was provided, and was not a safe mule to be ridden in such place under such circumstances and conditions, and by a person wholly unfamiliar with riding either horse or mule.

X.

That when the said party of excursionists (comprising the plaintiff among them, seated upon the mule "Chiggers" and being the last person in the

string of such mules) on said June 17, 1942, reached a place on the said "Bright Angel Trail" about 5 miles below the said north rim, the said mule, without any act or thing done upon the part of the plaintiff, did suddenly buck and jump and did throw the plaintiff from his back, and did throw the plaintiff off, and the plaintiff was thrown off and did fall upon his back upon the roadway, where he lay for a period of four hours before any assistance was brought to him.

That as a result of the said fall the Plaintiff did receive a fracture of the right transverse process of the 12th dorsal vertebra. [20]

XI.

That by reason of the same the Plaintiff did suffer continuous pain and discomfort at the small of his back and right hip. That such pain continues even to the present time.

XII.

That by reason thereof he has been obliged to and has remained away from his work as a plastering contractor, and has been obliged to and has received hospitalization and the attention of physicians.

XIII.

That by reason of the said injury to his spine and hip the plaintiff has been damaged in the sum of Five Thousand Dollars (\$5,000.00) and has paid, or been obliged to pay to said physician the sum of Three Hundred and Seventy Dollars /50c, and has lost an additional sum of Seventeen Hundred

and Eighty five Dollars (\$1,785.00) by reason of his absence from his work.

XIV.

That no part of any of said sums has been paid and the whole thereof is now unpaid to the Plaintiff.

Wherefore Plaintiff prays for judgment against the defendant in the sum of Seven Thousand One Hundred and Fifty Five Dollars and fifty cents (\$1,155.50) and interests and costs.

WALTER GOULD LINCOLN,
Attorney for Plaintiff. [21]

State of California,
County of Los Angeles—ss.

Elmer H. Mateas being by me first duly sworn, deposes and says that he is the Plaintiff in the above entitled action; that he has read the foregoing amended complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief; and as to these matters that he believes it to be true.

ELMER H. MATEAS

Subscribed and sworn to before me this 30 day of December, 1943.

[Seal] F. E. WEATHERHOLT,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Dec. 31, 1943. Edmund L. Smith, Clerk, by John A. Childress, Deputy Clerk.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes Now Defendant Fred Harvey, a corporation, and answering plaintiff's amended complaint for itself alone, and as a first defense thereto, admits, denies and alleges as follows:

I.

Alleges that said amended complaint, nor any part nor paragraph thereof, fails to and does not state a claim upon which relief can be granted to the plaintiff.

And As a Second Separate and Distinct Defense Thereto, This Answering Defendant Admits, Alleges and Denies As Follows:

I.

Answering paragraph IV, this answering defendant admits that at the time mentioned in plaintiff's amended complaint, this answering defendant maintained mules for the purpose of carrying persons and property in certain portions of the country generally known as the Grand Canyon of the Colorado, and said mules were used on the Phantom Ranch Trail and on the Bright Angel Trail, and this defendant charged a fee to persons riding said mules, but except as herein expressly [23] admitted denies each and all and every of the remaining allegations of said paragraph IV.

II.

Answering paragraph V, this answering defendant admits that Bob Ennis was the guide furnished by this answering defendant for said trip taken by plaintiff and others, but denies that the mules so used on said trip, except the mule ridden by said Bob Ennis, were under the sole control, charge and management of said Bob Ennis, but on the contrary alleges the fact to be that the mules were under the immediate control, charge and management of their respective riders.

III.

Denies generally and specifically the allegations of paragraph VI beginning with the word "That," on line 14, page 3, to and including the end of that paragraph.

IV.

Answering paragraph VII, this answering defendant denies the allegations of paragraphs numbered 1, 4 and VI, as attempted to be incorporated by reference in paragraph VII, except in so far as said statements contained in said paragraphs have been expressly admitted by this answering defendant.

V.

Denies generally and specifically each and all and every of the allegations contained in paragraph IX.

VI.

Answering paragraph X, this answering defendant admits that plaintiff fell from said mule upon

said Bright Angel Trail, but except as herein expressly admitted this answering defendant has no information or belief sufficient to enable it to answer the remaining allegations, and basing its denial on that ground denies each and all and every of the remaining allegations of said paragraph X.

VII.

This answering defendant does not have sufficient information or belief to enable it to answer the allegations of paragraphs XI, XII and XIII, and basing its denial on that ground denies each and all and every of the allegations contained in said paragraphs, and denies that plaintiff has been damaged in the sum of \$5,000.00, or any other sum or at all, or the sum of \$370.50 or any other sum or at all on account [24] of physicians services, or the sum of \$1785.00, or any other sum or at all by reason of loss of earnings.

VIII.

Answering paragraph XIV, this answering defendant admits that it has not paid any of the sums mentioned in paragraph XIII of plaintiff's amended complaint, but denies that the whole or any part thereof is now due from this answering defendant to plaintiff, and denies that this answering defendant is indebted to plaintiff in any sum whatsoever.

IX.

Denies any liability upon the part of this answering defendant by reason of any matters set forth in plaintiff's amended complaint.

And as a Third, Separate and Distinct Defense
Thereeto, This Answering Defendant Admits,
Alleges and Denies as Follows:

I.

That the accident referred to in plaintiff's amended complaint was an inevitable and unavoidable accident in so far as this answering defendant is concerned.

And as a Fourth, Separate and Distinct Defense
Thereeto, This Answering Defendant Admits,
Alleges and Denies as Follows:

I.

That in riding said mule referred to in plaintiff's amended complaint, immediately prior to and up to the time of the happening of the accident referred to in plaintiff's amended complaint, the plaintiff himself had voluntarily assumed any risk to the riding of said mule.

Wherefore, this answering defendant prays that plaintiff take nothing, and that it be dismissed hence with its costs of suit incurred, and for such other and further relief as to the court may seem just.

SHELL & DELAMER,

By W. O. SHELL,

A member of the firm,

Attorneys for Fred Harvey,
a corporation.

Office & P. O. Address: Suite 1212, 215 W. 7th
Street, Los Angeles 14, California.

[Endorsed]: Filed Jan. 7, 1944. [25]

At a stated term, to-wit: The September Term, A. D. 1943, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 18th day of January in the year of our Lord one thousand nine hundred and forty-four.

Present: The Honorable: Leon R. Yankwich, District Judge.

[Title of Cause.]

No. 3179-Y Civil

TRIAL

This cause coming on for trial; Walter Gould Lincoln, Esq., appearing as counsel for plaintiff; W. O. Schell, Esq., appearing as counsel for defendant; John Q. Bybee, Court Reporter, being present and reporting the proceedings:

Emmett Myron Ennis is called, sworn, and testifies for plaintiff. Plaintiff's Exhibits Nos. 1 and 2 are marked for identification, and No. 3 is admitted into evidence. Said witness testifies further.

Elmer Mateas is called, sworn, and testifies for plaintiff. Plaintiff's Exhibit No. 4 is admitted into evidence. Plaintiff's Exhibit 1 for identification is offered and received in evidence and is marked Plaintiff's Exhibit No. 1. Plaintiff's Exhibit No. 5 is admitted into evidence.

June Mateas is called, sworn, and testifies for plaintiff.

At 12 o'clock noon Court recesses to 1:30 P. M. Court reconvenes at 1:50 P. M. appearances as before.

Leigh E. Sloan is called, sworn, and testifies for plaintiff. Plaintiff's Exhibit No. 6 is admitted into evidence. Said witness Sloan testifies further on cross examination. Plaintiff's Exhibits Nos. 7 and 6-A are marked in evidence and for identification, respectively.

June Mateas resumes the stand and testifies further.

Alice Rayle is called, sworn, and testifies for plaintiff. [26]

Emmet Myron Ennis is recalled and testifies further for plaintiff.

John Bradley is called, sworn, and testifies for plaintiff.

Ella W. Vogel is called, sworn, and testifies for plaintiff.

Plaintiff rests.

Defendant moves for non-suit and moves to dismiss.

Attorney Lincoln suggests plaintiff be allowed to amend to conform to proof.

Motion to dismiss is granted. Counsel for defendant will draw judgment. [27]

District Court of the United States for the Southern District of California, Central Division.

No. 3179-Y Civ.

ELMER H. MATEAS,

Plaintiff,

vs.

FRED HARVEY, a corporation, et al.,

Defendants.

JUDGMENT OF DISMISSAL

The above entitled matter having come on regularly for trial on the 18th day of January, 1944, before the Honorable Leon R. Yankwich, Judge presiding, sitting without a jury, a jury having been *been* expressly waived, plaintiff being present in person and represented by his attorney Walter Gould Lincoln, Esq., defendant Fred Harvey, a corporation, being represented by its attorneys Schell & Delamer, by W. O. Schell, Esq., and evidence both oral and documentary having been introduced, and plaintiff having rested his case, and defendant having moved for a dismissal of the action on the ground that the evidence failed to show facts on which relief could be granted, and the Court being fully advised in the premises, and it appearing to the Court that said motion should be granted, and the Court having granted said motion:

Now, Therefore, it is Ordered, Adjudged and

Decreed that the above entitled action be and the same is hereby dismissed, defendant to have and recover its costs herein incurred. [28]

Dated: January 31, 1944.

Taxed at \$113.91

LEON R. YANKWICH,
Judge

Approved as to form this 26 day of January,
1944.

WALTER GOULD LINCOLN
Attorney for Plaintiff.

Approved as to form this 26 day of January,
1944.

SCHELL & DELAMER
By W. O. SCHELL
Attorney for defendant Fred
Harvey, a corporation.

Judgment entered Jan. 31, 1944, docketed Jan.
31, 1944, C. O. Book 23, Page 174. Edmund L.
Smith, Clerk, By Louis J. Somers, Deputy.

[Endorsed]: Filed Jan. 31, 1944. [29]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is Hereby Given that the Plaintiff, Elmer
H. Mateas, in the above entitled action, hereby
Appeals to the United States Circuit Court of
Appeals for the Ninth Circuit, from the judgment

entered in this action on the 31 day of January, 1944.

WALTER GOULD LINCOLN

Attorney for Appellant.

[Endorsed]: Filed Mailed copy of Notice of Appeal & bond to Schell & Delamer, Attys., for deft Fred Harvey, a corp. Apr. 17, 1944, Edmund L. Smith, Clerk, By John A. Childress, Deputy Clerk. [30]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Whereas the Plaintiff in the above entitled action is about to Appeal to the United States Circuit Court of Appeals for the Ninth *District* from a judgment rendered against him in the said action in the District Court of the United States for the Southern District of California, Central Division;

Now Therefore, in consideration of the premises, and of such appeal, we, the undersigned residents of the County of Los Angeles, State of California, do hereby jointly and severally undertake and promise, on the part of said Appellant, that the said Appellant will pay all costs which may be awarded against him if the said Appeal is dismissed, or the judgment affirmed, or all such costs as the Appellate Court may award if the judgment is modified, not to exceed \$250.00, to which amount

we acknowledge ourselves jointly and severally bound.

JACK MATEAS
EVA MATEAS
CHARLIE PARGE
ANNIE PARGE [31]

State of California,
County of Los Angeles—ss.

Jack Mateas, Eva Mateas, Charles Parge and Annie Parge each for himself deposes and says:

That he is one of the sureties whose name is subscribed to the within undertaking; that he is a resident and free-holder of the State of California, and is worth the sum in the undertaking specified, over and above all his just debts and liabilities, exclusive of property exempt from execution.

JACK MATEAS
EVA MATEAS
CHARLIE PARGE
ANNIE PARGE

Sworn and subscribed to before me this 14 day of April, 1944.

[Seal] F. E. WEATHERHOLT
Notary Public in and for said County and State.

[Endorsed]: Filed April 17, 1944. [32]

[Title of District Court and Cause.]

NOTICE OF DESIGNATION OF PAPERS
TO BE USED ON APPEAL

To: The Defendant and to their attorneys, Messrs.
Schell & Delamer.

You and each of you will please take notice that the Plaintiff Elmer H. Mateas, Appellant herein, designates the following papers as being those upon which he will rely on appeal, to wit:

Removal Papers;
Amended Complaint;
Answer Thereto;
Minute Order of January 18, 1944;
Judgment;
Notice of Appeal; Bond on Appeal;
Reporters Transcript;
All Plaintiff's Exhibits.

The above constitute the entire record on appeal.

WALTER GOULD LINCOLN
Attorney for Appellant.

Received copy of the within Notice of Designation this 17 day of April, 1944.

SCHELL & DELAMER
Attorney for Defendant

[Endorsed]: Filed April 18, 1944. [33]

[Title of District Court and Cause.]

ORDER FOR TRANSFER OF ORIGINAL
EXHIBITS

: It is Hereby Ordered that the original exhibits now on file in the above entitled matter need not be copied, but may be transferred in their original state to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: Los Angeles, California, May 23rd, 1944.

PAUL J. McCORMICK

Judge.

[Endorsed]: Filed May 23, 1944. [34]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 34 inclusive contain full, true and correct copies of: Complaint for Damages for Personal Injuries; Notice of Motion to Remove to Federal Court; Petition for Removal to Federal Court; Bond on Removal; Minute Order (Superior Court) Entered September 16, 1943; Order for Removal; Certificate of Clerk of Superior Court; Amended Complaint; Answer to Amended Complaint; Minute Order Entered January 18, 1944; Judgment of Dismissal; Notice of Appeal;

Bond for Costs on Appeal; Notice of Designation of Papers to be Used on Appeal and Order for Transfer of Original Exhibits which, together with the Reporter's Transcript and Original Exhibits transmitted herewith, constitute the record on appeal to the Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$13.85 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 24 day of May, 1944.

[Seal] EDMUND L. SMITH, Clerk

By THEODORE HOCKE

Deputy Clerk

REPORTER'S TRANSCRIPT OF TESTIMONY
AND PROCEEDINGS ON TRIAL

Appearances:

Walter Gould Lincoln, Esq.,
For plaintiff.

Messrs. Schell & Delamer,
by Walter O. Schell, Esq.,
For defendant.

Hon. Leon R. Yankwich, Judge Presiding.

Los Angeles, California,
Tuesday, January 18, 1944,
10 A.M.

The Court: Are there any ex parte matters this morning? Calendar matters.

The Clerk: 3179-Civil-Elmer H. Mateas against Fred Harvey, a corporation.

Mr. Schell: Ready for the defendant.

Mr. Lincoln: The plaintiff is ready.

The Court: All right. Proceed.

Mr. Lincoln: Your Honor has read the pleadings, I take it?

The Court: Yes, I have. If you want to make an opening statement it is all right.

Mr. Lincoln: No, I don't care to so long as you have read the pleadings, that is quite sufficient.

The Court: I have read the pleadings.

Mr. Lincoln: Mr. Ennis, will you come forward, please? [2*]

* Page numbering appearing at top of page of original Reporter's Transcript.

EMMET MYRON ENNIS,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: State your name, please.

The Witness: Emmet Myron Ennis.

Direct Examination

Q. By Mr. Lincoln: Mr. Ennis, what is your occupation?

A. I am assistant manager of Fred Harvey Transportation Company at the Grand Canyon.

Q. And how long have you been in such occupation?

A. Well, I went to work for the company first in 1907, I worked there up until 1915, went to the army and come back in 1921.

Q. Since 1921 up to the present time you have still been working for them?

A. Been working for them; yes, sir.

Mr. Lincoln: I wonder, your Honor, if the court is familiar with the vicinity of El Tovar Hotel, and the trails there. Might we say if the court was we might not have to go into an explanation.

The Court: I don't know. For the record, I don't take judicial notice of things like that. Put it in the record. Describe it so you will have a record. So make your record. [3]

Q. By Mr. Lincoln: What are your particular duties in that office that you hold, Mr. Ennis?

A. Well, I am charged with all transportation,

(Testimony of Emmet Myron Ennis.)

both automobiles, buses, mules, stages to Williams and camps, and supervision of Phantom Ranch.

Q. The Harvey Company which you speak of, does that operate any hotels or places, or restaurants, or reserves, of any kind on the south rim of the Grand Canyon in Arizona? A. It does.

Q. Is there a hotel known as "El Tovar"?

A. There is.

Q. And that is one of the Harvey Company's places, is it, on the south rim? A. It is.

Q. That has been built about how long?

A. Well, the hotel was erected I believe in 1904.

Q. You spoke about some mules being a portion of your transportation problems. What are those mules used for?

A. Sight-seeing into the Canyon, packing, taking people down to the river.

Q. About how high is the south rim from the river itself? A. About 4800 feet.

Q. Are there other trails that go from the south rim to the river? A. There is. [4]

Q. How many? I mean, now, in the vicinity of El Tovar.

A. There is the "Bright Angel", which starts immediately west of the El Tovar, and there is what is known as the "Kaibib" Trail, and the "Yankee", which is east three miles.

Q. That latter one is about three miles east?

A. Three and one-half miles east.

Q. Does that also go to the Phantom Ranch?

A. Yes, sir.

(Testimony of Emmet Myron Emis.)

Q. And the Phantom Ranch is located where?

A. Near the bottom of the Grand Canyon on the banks of Bright Angel Creek.

Q. Is that across the Colorado River?

A. It is.

Q. The Colorado River, of course, being in the bottom of the Canyon? A. Correct.

Q. Does that Kaibib Trail also go up on the other side of the Canyon?

A. Out on the north rim.

Q. And on the north rim is there another river similar to the one on the south rim; is that right?

A. There is, yes.

Q. The Bright Angel Trail which you speak of, is that a perfectly straight trail going straight down, or what is its construction? [5]

A. Well, it follows the contours of the Canyon where it was possible to make a trail; it is impossible to make a trail straight down.

Q. About how long in miles is the Bright Angel Trail from the south rim; that is, approximately? At approximately the El Tovar to the base of the Canyon? A. To the river?

Q. To the river, yes. A. Eight miles.

Q. How wide a trail is that?

A. Well, it varies in places from four to five or six feet.

Q. These pack trains which you spoke of, those are pack trains of mules, are they?

A. Yes, sir.

Q. And what do they pack?

(Testimony of Emmet Myron Ennis.)

A. Pack anything; goes down to the Canyon, and camp or lodge.

Q. To the Phantom Ranch? A. Yes.

Q. That is also maintained by the Harvey Company? A. It is.

Q. Who selects the mules for use in the pack trains, or the passenger trains?

A. I don't quite understand the question.

Q. Who selects the mules? [6]

A. What do you mean? When they are purchased and brought to camp?

Q. Yes, when purchased originally?

A. The mules for the last twenty-five years have been purchased by J. E. Shirley, manager of the Transportation Company.

Q. He is not here today, is he? A. No, sir.

Q. After those mules are purchased do they have any training period? A. They do.

Q. What does that consist of?

A. First they are put on a pack train and broke to pack a load, and halter broke, and the guides that runs the pack trains will take them down the trail and ride them part of the way back up the trail; that is the way our mules are trained.

Q. Now, do they go first on the Kaibib Trail?

A. The first—well, not necessarily—that happens to be that is where the bulk of the packing is, on the Kaibib Trail.

Q. So that they would naturally, perhaps, go there first to become accustomed to packing and going up and down; is that right?

(Testimony of Emmet Myron Ennis.)

A. Well, yes.

Q. And then you do pack up and down, as I understand [7] you, to the Phantom Ranch?

A. That is right.

Q. Of course, not so much as you do the Kaibib?

A. Well, we reach the Kaibib—Phantom, also, from the Kaibib Trail, which is the shortest trail to Phantom Ranch.

Q. I see. How long a training period do these mules have on the packing before you use them for passengers?

A. That depend upon the disposition of the mule.

Q. Ordinarily?

A. Well, anywhere from a year to two years.

Q. Mules do have different dispositions, as well as horses or people, don't they? A. Correct.

Q. Is the disposition of these mules determined by any one particular person in your outfit?

A. The disposition of the mules is generally determined by the packer, in conjunction with the trail foreman.

Q. Who was the packer on the Kaibib Trail in 1942? A. "Shorty" Yarberry.

Q. "Shorty" Yarberry? A. Yes.

Q. Did he also pack on the Phantom Ranch trail? A. That is where he was packing.

Q. What?

A. On the Kaibib Trail, too, the Kaibib Trail to [8] Phantom.

(Testimony of Emmet Myron Ennis.)

Q. I see. Pardon me. Do you have any packing to the Phantom Ranch by the Bright Angel Trail? A. We do, now; yes, sir.

Q. But you didn't in 1942?

A. We did in the winter of 1942, or the early spring.

Q. And previous to 1942?

A. Practically every winter and spring our pack, where we only run one pack train a week to Phantom Ranch to get their supplies up, is taken down the Bright Angel Trail and back out.

Q. Has the Harvey Company for some period of years carried passengers down the Bright Angel Trail to the Phantom Ranch and back?

A. Yes, there is the Bright Angel Trail and the Kaibib Trail is connected with what is called the "River Trail", and before the war we used the Kaibib Trail to Phantom Ranch, returning to the south rim of the Bright Angel Trail, making a loop trip.

Q. Well, what was the situation in 1942?

A. Kaibib Trail was closed to taking "dudes" to Phantom Ranch; we were using the Bright Angel Trail going and returning to save manpower.

Q. When did they close the Kaibib Trail?

A. June, 1942, when the Federal Government froze sight-seeing by automobiles. [9]

Q. Are these persons who go down the Bright Angel Trail, these people are sight-seers, strangers? Did you use the expression "dudes"?

(Testimony of Emmet Myron Ennis.)

A. We call them dudes."

Q. I see. As distinguished from cattlemen or cowboys?

A. Any cowman or cowboy that comes there and hires a mule to go down to the bottom of the Canyon, he is a "dude" to us.

Q. Are the mules which are to be used upon this trip, which the "dudes" take, kept in any particular place?

A. They are kept in the barns or, you might say, at the head of the trails. That is where all our activities start from, from the barns themselves.

Q. And those are mules which have been trained previously on the Phantom Ranch trips?

A. They have been trained on either trail.

Q. On either trail?

A. They were packing on both trails.

Q. Do you have any specific number of persons that you take down on the trip, or does that depend on the number of people that want to take a trip?

A. We limit the party to ten people. If it is one person to go, one guide will take him; if ten is to go, he will take ten; if there is eleven to go, it is two parties; one guide handles ten people. [10]

Q. Have you taken people down the Bright Angel Trail? A. Not in late years, no.

Q. Since how long?

A. Well, 1915, outside of special friends I take down there.

(Testimony of Emmet Myron Ennis.)

Q. Do you have a son by the name of Bob Ennis? A. I do.

Q. What was his occupation in 1942?

A. He was a guide.

Q. Taking people down the Bright Angel Trail?

A. The Bright Angel Trail.

Q. And how old was he at that time?

A. 18 years old.

Q. How long had he been familiar with mules or horses?

A. The first time I took Bob into the Canyon he was three years old, and I put him on a mule and he looked back and says, "Dad, I am your guide," and he has been riding ever since.

Q. Been handling mules or horses ever since?

A. Yes, sir.

Q. When a party is taken down the trail what location does the guide have; that is, is he first, or last, or in the middle, or where?

A. He is always in the lead.

Q. Is there any particular person who selects the particular mule any one person shall ride? [11]

A. No. The trail foreman and the guides generally ask—size the people up, and if they get pretty close to their weight, or they look like they are pretty heavy, they will ask what the weight is, and put them on the mule according to weight.

Q. Is that the only way the mules are selected for particular persons or passengers?

A. Yes, sir, because the trail foreman and the

(Testimony of Emmet Myron Ennis.)

guides know what weight a mule will handle and go into the Canyon and bring them back out.

Q. I see. And then each trip will have different weights or mules to accommodate different weights of "dudes"; would that be right?

A. Well, they try to see what mules—yes—the weight of the individual mule doesn't count; some of the biggest mules won't handle the big loads out of there.

Q. Now, Mr. Ennis, I am showing you what appears to be a circular headed "Grand Canyon, National Park, Arizona." Did you ever see a circular like that before? A. I have.

Q. And on the inside of it is a picture entitled "Going Down The Trail." Does that look like anything which you have ever seen before?

A. I have to get my eyes; old age is creeping up on me. Yes.

Q. And where would you say that was representing? [12]

A. That is going down on the Kaibib Trail.

Q. The Kaibib? A. Yes.

Mr. Lincoln: We offer this for identification only at this time, your Honor.

The Court: Very well.

Mr. Schell: I have not objected. I don't quite see the materiality of all this.

The Court: It is offered only for identification; therefore, there is nothing at the present to worry about until they offer it in evidence.

(Testimony of Emmet Myron Ennis.)

Q. By Mr. Lincoln: I show you another, what seems to be another circular, Mr. Ennis. The first circular I had was printed in blue and this one seems to have a reddish tinge to it, and did you ever see a circular like this one before?

A. Yes, sir.

Q. And I also call your attention to several pictures here of persons on horseback, either horseback or muleback. Will you tell me, please, if you recognize those pictures as being any portion of those trails which we have been speaking of?

A. This is taken from the top. It is nowhere near the Bright Angel Trail.

Q. Referring to a picture which is underneath a map, the map headed "Entrances Around The Grand Canyon," one [13] entitled "Heading Down Kaibib Trail To Phantom Ranch." This is also a picture of a portion of the Kaibib, is it?

A. That is right.

The Clerk: Exhibit 1 for identification.

Mr. Lincoln: We offer this, also, for identification, your Honor.

The Clerk: Exhibit 2 for identification.

Q. By Mr. Lincoln: I show you what seems to be a little circular presumably printed by the United States Department of the Interior, headed on the outside "Grand Canyon, National Park, Arizona," and call your attention particularly to a map on page 9 of that circular headed "Map of the South Rim." Will you tell me, please, would you be good enough to look at that, and tell me,

(Testimony of Emmet Myron Ennis.)

please, if you recognize that as being a fairly accurate map of that vicinity?

A. Yes, that is a correct map. I don't think it is a tour, or anything like that, but it is just a general guide that the Park Service puts out for the information of the "dudes" as they drive into the Canyon.

Mr. Lincoln: We will offer this, your Honor. I am only offering, the court will understand, at this time page 9, not the balance of the circular, in evidence.

The Clerk: 3 in evidence.

Mr. Lincoln: That is all, Mr. Ennis. [14]

Cross Examination

Q. By Mr. Schell: Mr. Ennis, as I understand it, these mules, when they come to the Harvey Company, are mules—both pack on both trails; that is, the Kaibib and the Bright Angel?

A. That is right.

Q. And sometimes down and up one and sometimes the other?

A. These pack trains go wherever they are required to go. Now, the Santa Fe Railroad maintains a pumping station at the Indian Gardens, which is three and a half miles down the Bright Angel, and they require and get all the packs down there so they are working on either trail.

Q. And then after the mule is given a certain length of time in pack, what do you have them do next?

(Testimony of Emmet Myron Ennis.)

A. Well, whenever the trail foreman and the packer thinks they are gentle enough they are brought into the buildings there from Yankee, if they happen to be at Yankee, and the trail foreman will put the guides on them and they will ride them for a certain length of time, until they determine they are safe for "dudes" to ride.

Q. You said something about the guides, while they are in pack, will also ride them; that is, the packers ride them?

A. That is right; that is the way they are started in; when they first start in on the pack train the mules will probably go down with just a light saddle on them, maybe a [15] couple of canteens of water, and keeps building up until they can handle the load on there, and learn the trail, and then the packer will change, he will alternate, and he will ride one mule a little while and change and put his saddle on another, and that is the way they are broke to ride.

Mr. Schell: That is all.

Redirect Examination

Q. By Mr. Lincoln: Do they keep any record, Mr. Ennis, of the mules? I mean by that, a record such as how many times they have been down the trail, or what they carry or anything of that sort?

A. No; the packer keeps a record of what he takes down to Phantom Ranch, but he does not keep what goes down on the individual mule.

Q. That is what I mean. Speaking about the

(Testimony of Emmet Myron Ennis.)

—you were speaking about the Indian Garden in response to a question from counsel. Now, what is the “Indian Garden” or “Gardens”? Is there on “s” on the end of that?

A. The Indian Gardens.

Q. “s”? A. Yes.

Q. What is that?

A. Well, it got its early name—the Indians were the first ones that had a trail into Grand Canyon, and they raised corn and one thing and another down there; the springs [16] breaks out there where they could irrigate, and when the white man, as I understand, first built trails in there they named it the “Indian Gardens.”

Q. Well, at the present time, or in 1942 at any event what was there there? What did the Indian Gardens consist of?

A. The Indian Gardens consisted of a pump-house and a couple of cottages, a cottage maintained by the Santa Fe Railroad—by the Santa Fe Railroad for their maintenance crews when they go down there to work on the pipe lines, or the electric lines, and the Government has a house there that their trail maintainers live in.

Q. How far down did you say that was from the rim? A. About three and a half miles.

Q. Was that one of the stopping places on the trail trips?

A. That is a rest stop both going and coming.

Q. Is that the only stop they make on the trail going down or coming up?

(Testimony of Emmet Myron Ennis.)

A. Well, to dismount, yes, unless somebody gets exceedingly tired.

Mr. Lincoln: That is all.

Mr. Schell: That is all.

The Court: All right. [17]

ELMER H. MATEAS,

the plaintiff, called as a witness in his own behalf, being first duly sworn, testified as follows:

The Clerk: Please state your name.

A. Elmer Mateas.

Mr. Lincoln: This witness, your Honor, is extremely deaf.

The Court: That is all right. You can come up here.

Mr. Lincoln: He has to use one of his machines there.

The Court: Well, that is all right.

Mr. Lincoln: I might be permitted to interrogate the witness closer than this?

The Court: Yes; stand here, if you want.

Direct Examination

Q. By Mr. Lincoln: Mr. Mateas, how old are you? A. 31.

Q. Did you ever go to the Grand Canyon?

A. Yes, sir.

Q. When did you go there the first time?

A. The first time was in 1941, about July.

(Testimony of Elmer H. Mateas.)

Q. And at that time did you take any excursion down Bright Angel Trail?

A. We wanted to. We was unable to make the accommodations. [18]

Q. Did you go there about June, 1942?

A. Yes, sir.

Q. And do you remember what day it was that you arrived at El Tovar?

A. We arrived on June 16th.

Q. How did you come, by automobile or stage?

A. Automobile.

Q. Anybody with you? A. My wife.

Q. Now, do you remember the day of the week that it was you arrived?

A. We arrived on a Tuesday.

Q. And at that time did you discuss with anybody about going down the Bright Angel Trail?

A. We took our tickets out at the hotel, at the booth reserved for that, discussed with the man that sold tickets——

Q. Do you know what his name is?

A. No, I don't.

Q. What did you say to him, if anything, concerning a proposed trip?

Mr. Schell: To which we object as being incompetent, irrelevant and immaterial; be hearsay, and no foundation laid as to what this witness said to whoever was at the ticket window.

Mr. Lincoln: This was the man from whom they purchased tickets to go on the trip. This was

(Testimony of Elmer H. Mateas.)

the man this [19] witness just testified about who was in the booth, the special booth which they had for this particular trip.

The Court: You mean for the mule trip?

Mr. Lincoln: Yes, sir.

The Court: Well, all right. I think subject to a motion to strike, it may be admitted. Objection overruled.

Mr. Lincoln: Let me go into it perhaps a little more deeply, your Honor; the detail of it will perhaps appeal to your Honor.

Q. By Mr. Lincoln: This booth you speak of, where was that situated?

A. I am not sure at the El Tovar, but one of the hotels, like in the lobby, like an alcove off on one side of it, and it was like a corner, in front of it, and the man sold tickets behind that.

Q. Tickets for the excursion, you mean?

A. Yes; maybe or maybe not, they had tickets for sale—to different things—I don't know.

Q. As I say, did you have some discussion with him about the trip?

A. I told him I had never ridden any mules before.

Mr. Schell: I object to the answer. The question just called for a yes or no answer.

Mr. Lincoln: The answer may go out.

Q. By Mr. Lincoln: Say "yes" or "no" whether you [20] had a discussion or not.

A. Yes.

(Testimony of Elmer H. Mateas.)

Q. Now, what did you say to him and what did he say to you?

Mr. Schell: To which we make the same objection.

The Court: The same ruling. Go ahead.

Q. By Mr. Lincoln: Go ahead.

A. I told him I never had ridden any mules before, or horses either, and he says probably 75 per cent of the people who made the trip had never been on a mule or horse before.

Q. Anything else you said at the time?

A. Nothing I recall in particular, except—on that subject.

Q. Was your wife there with you at the time?

A. She was with me at the time.

Q. All right. Did you buy any tickets for such a trip? A. Yes, sir, we bought two tickets.

Q. And how much did you pay for those?

A. I don't recall.

Q. Did you pay something?

A. We paid something.

Q. Then was that for a trip that same day?

A. No, for a trip the next day.

Q. The next day? Well, now, what did you do the [21] next day with relation to this trip? Where did you go and what did you do?

A. The corral where they had the mules saddled and ready was at the head of the trail, and we went to the trail at 11 o'clock, the time the ticket called for.

Q. And you went to this corral, did you?

(Testimony of Elmer H. Mateas.)

A. Yes, sir.

Q. Did you see any mules in the corral?

A. Yes, sir.

Q. Were there any people other than your wife and yourself who were to take this trip?

A. Yes, sir.

Q. Were they at the corral to go about this same time?

A. There was one party going down ahead of us, several people already there, whether our party was there first or after—well, we did—I don't know—but many people around.

Q. How many people were there in your party?

A. About seven.

Q. Who selected, if anybody, who selected the particular mule for you to ride?

A. The trail master.

Q. And how was that selection made? That is, what did he do or what did he say?

A. Well, he just picked out a certain person for a certain mule. He called me over there for the mule going [22] out, and that was all.

Q. Was that the mule you rode all the way down? A. Yes, sir.

Q. Did you ever see this particular mule before that day? A. No, sir.

Q. Had you ever ridden a mule before that day?

A. No, sir.

Q. Or a horse? A. No, sir.

Q. Had you ever been down this trail before?

A. No, sir.

Q. Either on foot or on muleback?

(Testimony of Elmer H. Mateas.)

A. Neither one.

Q. Did you notice the other people who were to take this same trip as they got on their mules?

A. I am not sure I understand what you mean.

Q. Did you see these other people who were going with you? A. Yes, sir.

Q. Did you see them as they got on their respective mules?

A. Not all of them, to say they were all mounting one after another, I saw them.

Q. You saw them getting on from time to time?

A. Yes, sir. [23]

Q. Did you notice anything different between the way any of these people held their reins for their mules from the way you held yours?

A. Yes, sir.

Q. Now, wait a minute. You said yes? What was that way? Go ahead. What was that?

A. Our party, or the other party, or both, they let their reins hang from the saddle horn loose, and let it hang there, and I did the same, and the trail master came over and told me to hold the reins in my hands at all times.

Q. Do you see the trail master in the courtroom today? A. I believe I do.

Q. Which one is it?

A. The second one over there from the inside.

Q. The gentleman with the red tie?

A. Yes, sir, the red tie. I didn't see that.

Q. You remember the name of the man who was the guide on the trip?

(Testimony of Elmer H. Mateas.)

A. The guide on the actual trail was Bob Ennis.

Q. How old a man would you say he was, approximately? A. About 20.

Q. Where was he in relation to the other persons in the string of mules?

A. He was in the lead.

Q. And where were you in relation to the rest of them? A. I was the last. [24]

Q. Did Mrs. Mateas go on the trail with you?

A. Yes, sir.

Q. And where was she in the string?

A. She was pretty close to the front.

Q. What day was it you went down on the trip?

A. June 17th.

Q. What year? A. 1942.

Q. I show you a photograph and ask you if you have ever seen that before? A. Yes, sir.

Q. When was that taken?

A. On June 17th when we was just starting the trip.

Q. What does that photograph represent?

A. That is the particular party I was in, my wife and I.

Q. And showing you this and calling your attention to the person at the very end of the string there, the one at the top of the picture, who is that? A. That is my picture on the end.

Mr. Lincoln: We will offer this, your Honor.

Mr. Schell: Just a minute. Let me see it.

The Court: Go ahead. It may be received.

Mr. Schell: No objection.

(Testimony of Elmer H. Mateas.)

The Clerk: 4 in evidence.

Q. By Mr. Lincoln: Now, as you started down the [25] trail this particular day, what was the condition of your health?

A. There was nothing wrong with my health.

Q. Was there anything wrong with your back?

A. Not in the least.

Q. Did you have any injury to your back of any kind? A. Not in the least.

Q. Did anything happen on the trip?

A. Yes, sir.

Q. Where did it happen with reference to the rim or the river?

A. It was quite a ways down—quite a ways down the rim, I believe it was; I understand about a half mile before you reach the river.

Q. After you had passed Indian Gardens?

A. After we had passed Indian Gardens.

Q. Do you remember what time it was you got to Indian Gardens?

A. Got at Indian Gardens about 2 o'clock, or a little after. I don't know exactly.

Q. What was done at Indian Gardens?

A. We had lunch at Indian Gardens.

Q. Everybody dismount?

A. Everybody dismounted.

Q. On the way down how did your mule act?

A. On the way the mule—well, he tried to run away [26] with me four or five times.

Q. What did he do?

(Testimony of Elmer H. Mateas.)

Mr. Schell: Just a minute. I move to strike that.

Mr. Lincoln: That may go out. That is all right. That may go out.

The Court: Yes.

Q. By Mr. Lincoln: Just tell us what he did. How he acted.

A. Well, just by walking along like the rest he would suddenly try to squeeze through the other mules and get away over the line, away from the end of the line, try and squeeze up through the trail, get out in front.

Q. Did he do that on more than one occasion?

A. Yes, sir.

Q. Did he buck at all before you reached Indian Gardens? A. No, sir.

Q. At Indian Gardens, or thereabouts, was there some change made between you and some other person in the party? A. Yes, sir.

Q. A change of mules? A. Yes, sir.

Q. How did that come about?

A. Well, the man directly in front of me, Mr. Boles, talked about it once in a while, and he was the one that said my mule—we discussed I wasn't an experienced rider, [27] and he was an experienced rider, and he offered to trade mules with me. At Indian Gardens we traded mules.

Q. And were you put last, or put next to the last in the string?

A. Oh, we hadn't even started up again.

(Testimony of Elmer H. Mateas.)

Q. You hadn't started up again? What happened?

A. We were on the mules; Bob Ennis came back checking us, he saw we were on different mules, and he made us return to our original mules.

Q. What did he say to you in that regard?

A. Word for word, I wouldn't know, but in effect that we had to keep the mules we was given with up above.

Q. Did either you or this other gentleman tell him why you changed mules? A. Yes, sir.

Q. What did you tell him?

A. I told him that——

Mr. Schell: That is objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Q. By Mr. Lincoln: What did you tell him?

A. I told him, in effect, I could not handle the mule I was on; Mr. Boles said he could handle any mule; we wanted to trade over.

Q. Now, after you had rested at Indian Gardens and you started out again, did anything else happen with you and [28] your mule?

A. Yes, sir.

Q. What happened?

A. Why, immediately at Indian Gardens I lined up at the water trough; the mules drink before we start off; the mule once again tried to start off as before, to break loose.

Q. What was the result of that?

(Testimony of Elmer H. Mateas.)

A. Well, the same as always had previously; I was told to rein him in, or put him back in line when he did that.

Q. And then a little bit later did something else happen with the mule and yourself?

A. Yes, sir, a little bit later he ran off and this time I tried to rein him up and he went into a buck and threw me off.

Q. Do you know how many times he bucked?

A. Not by actual count.

Q. Was it more than one? A. Yes, sir.

Q. He threw you off? Now, just where did you land, if you know, with reference to the trail itself?

A. I believe I landed a little bit off the trail.

Q. And where did you land with reference to your own body? A. On the base of my spine.

Q. Do you know what happened to the mule, after he [29] bucked you off? A. I don't.

Q. When you landed at the base of your spine did you have any pain immediately?

A. Yes, sir.

Q. And did that pain continue?

A. Yes, sir.

Q. For how long a period?

A. Well, it grew worse as I went along.

Q. How long were you on that particular spot where you landed? I mean the spot of ground, before you were moved at all?

A. About four hours.

Q. And then what was done?

(Testimony of Elmer H. Mateas.)

A. A doctor came down from the rim and he gave me a shot in the arm and some pills and taped me up.

Q. Did that shot in the arm you speak of have any effect as far as the attending pain was concerned? A. Very little, if any.

Q. He taped you up? A. Yes, sir.

Q. Now, he taped you to and from where?

A. Well, he had wide strips of adhesive tape and taped across my back from rib to rib, approximately across the spine.

Q. Did that have any effect as far as mitigating the [30] pain was concerned? A. Some.

Q. What time of day was that, do you remember?

A. When he arrived it was about 7 o'clock in the evening.

Q. In the evening? A. Yes, sir.

Q. Did you finally get up to the north rim?

A. Yes, sir.

Q. That day?

A. We were at the south rim.

Q. At the south rim, I should say.

A. Not that day.

Q. Not that day? A. No.

Q. You finally got up there?

A. Finally got up there.

Q. How did you get back?

A. They brought a mule, a stretcher-bearer mule, down and roped me to a stretcher fastened to the mule and went back up that way.

(Testimony of Elmer H. Mateas.)

Q. Was there anything said before that time about taking you up on muleback without a stretcher? A. I didn't hear anything.

Q. Now, when you got to the south rim what time was it? [31]

A. It was about 5 o'clock the next morning.

Q. And where were you taken then?

A. To the Grand Canyon Hospital.

Q. How long did you stay in the hospital?

A. About three weeks.

Q. Were you in bed a portion of that time?

A. Yes, sir.

Q. How long? A. About two weeks.

Q. Attended by a physician? A. What?

Q. Attended by a doctor during that period?

A. Yes, sir.

Q. What was the name of the doctor?

A. Dr. Cox.

Q. Who selected the doctor?

A. He was a doctor in the hospital.

Q. Did you have a nurse, also?

A. Yes, sir.

Q. Do you know the name of the nurse?

A. Miss Coulter.

Q. How long were you confined to bed?

A. About two weeks.

Q. During that period, did you still continue to suffer this pain in your back?

A. Yes, sir. [32]

Q. How serious was that? Can you describe that pain in any way?

(Testimony of Elmer H. Mateas.)

A. Well, the doctor wanted to take X-rays and he gave me more shots.

Q. Did those have any effect in either lessening or completely stopping the pain?

A. They might have lessened it a little, but very little, if any.

Q. Where was this pain in your body particularly?

A. Low on my back and kind of centered over towards my right hip.

Q. In addition to this pain, did you have any other suffering in your body? Any other portion of your body?

A. I had a skinned elbow.

Q. Head ache at all?

A. Yes, sir.

Q. For how long a period did that continue?

A. The headaches more or less continue yet.

Q. After you were permitted to get out of bed, how long then did you remain in the hospital?

A. About a week.

Q. And what were you doing then; that is, in relation to any manipulations of your legs, or arms, or back?

A. Well, I was trying to be able to move enough to be allowed to go home. I came first from setting up in bed to a wheelchair and then trying to walk.

[33]

Q. How would you attempt to walk?

A. Holding my—supporting myself by a chair, and pushing the chair across the room.

Q. Up to the time of the 17th of June what had been your occupation over a period of years?

(Testimony of Elmer H. Mateas.)

A. I was a plastering contractor.

Q. You were a plastering contractor?

A. Yes, sir.

Q. Did you do plastering yourself?

A. Yes, sir.

Q. Interior?

A. Both interior and exterior.

Q. Exterior? What we call stucco; is that right?

A. Stucco, yes.

Q. Does that work of yours require heavy, physical exertion?

A. Yes, sir.

Q. For how long a period had you been engaged in that work?

A. Oh, about 15 years. I started when I was about 16.

Q. And you say you were a contractor. By that, you took contracts yourself, did you?

A. Yes, sir.

Q. For large or small jobs?

A. Both.

[34]

Q. And then you hired men to help you?

A. Yes.

Q. To assist you in the plastering?

A. Yes, sir.

Q. You actually worked on the job yourself all the time?

A. Yes, sir.

Q. Did you charge or credit to yourself a daily wage, or a yearly, or a weekly wage, for the work which you did yourself?

A. No, I kept a general idea, job by job; what was left over after expenses was paid was mine.

(Testimony of Elmer H. Mateas.)

Q. And over a period of years, we will say the two years before 1942, what had been your average monthly net earnings?

A. Between three and four hundred dollars a month.

Q. When was it you returned to Los Angeles?

A. About July 8th, I believe it was.

Q. And how did you come back?

A. By auto.

Q. The same auto you went with?

A. Yes, sir.

Q. Who drove? A. My wife.

Q. Did you suffer any pain on the way back?

A. Yes, sir. [35]

Q. Where were you? On what seat did you sit, or did you sit at all?

A. I was blocked up all around; they gave me several pillows, and we had pillows we taken with us; I was blocked with pillows all around me, and I sat on the front seat on the right-hand side.

Q. Was that the suggestion of Dr. Cox?

A. Yes, sir.

Q. And was all the work which you did in the hospital, or all the changes which you made from time to time, under the direction of this same Dr. Cox? A. I didn't understand that.

Q. I mean did anybody give you any—tell you what to do, or what not to do, while you were in the hospital, except Dr. Cox and the nurse?

A. Only Dr. Cox and the nurse.

(Testimony of Elmer H. Mateas.)

Q. I show you Exhibit No. 1 for identification and ask you if you ever saw this circular before.

A. Yes, sir.

Q. Do you remember when you saw it?

A. I saw it both in 1941 and again in 1942.

Q. And where? A. At the Grand Canyon.

Q. In the Harvey House, or, rather, in the El Tovar? A. In the El Tovar.

Q. Yes. Now, I want to call your attention to a [36] paragraph in this circular, "Trail Trips Into the Canyon. Although visitors may venture short distances down these trails on foot, the accepted mode of travel for longer journeys is by the famous Grand Canyon mules. These faithful, sure-footed animals, in charge of experienced guides, hold a 30 years record of carrying many thousands of inexperienced riders down the trails and back in perfect safety."

Did you read that before the 17th of June?

A. Yes, sir.

Mr. Schell: Just a moment. I object to that. I don't see the materiality of that in view of the pleadings in this case. The pleadings, as I see them now, your Honor, are these: That this particular mule "Chigger", which they claim to be the bad actor in this particular thing, was supposed to be a mule who had never been ridden by "dudes", or anybody, down the trail. In other words, that is the only thing that I think plaintiff states a cause of action in the present thing, that that was an inexperienced mule that had never been ridden be-

(Testimony of Elmer H. Mateas.)

fore, and I don't see the materiality of anything that might be in the literature to bear upon that subject, as to whether or not this mule "Chigger" had, or had not, had previous "dude" experience.

Mr. Lincoln: I don't understand, your Honor, we are confined to one word or one sentence, in our pleadings. [37]

The Court: Well, you are not. That is a guarantee of the pack. You are not claiming the pack was a wild pack.

Mr. Lincoln: No, sir.

The Court: This statement would be a guarantee of the pack. Some of your language would seem to apply. You would like to apply to this the common carrier rule; if an accident happens in a railroad, or street car, the company is blamed. I can't see where that language has to do with this.

Mr. Lincoln: May I suggest this, your Honor. Assuming that this gentleman did read this language and believed that it was true, believed that those mules, whichever mule it may be, either the mules in general or any one mule in particular, was a safer mule for an inexperienced rider.

The Court: Yes.

Mr. Lincoln: He had a right to rely upon that.

The Court: You are not charging fraud here.

Mr. Lincoln: Not at all; no, sir; not at all.

The Court: He had the right to rely on the ordinary thing, that it was a safe animal.

Mr. Lincoln: Yes, sir.

(Testimony of Elmer H. Mateas.)

The Court: And it is implied in the contract. In other words, it is not the strength of the guarantee, it is the fact of the knowledge on their part that it was a balky [38] mule; that is the cause of action; not the guarantee they gave you that it was safe to ride.

Mr. Lincoln: Yes, your Honor is quite right, but unfortunately I cannot prove my entire case with one question, nor even perhaps with one witness; I have to do things in piecemeal; I have to take little bits of blocks and try to fit a jig-saw puzzle together for your Honor to see the finished picture, and it did seem to me this particular phrase here was extremely material for a person to place his reliance upon and allow himself to be put upon the back of a mule that he had never seen before, trusting implicitly to the warranty which was in this clause.

The Court: That would not make a cause of action. That would not be a cause of action anyway. Supposing he threw away the reins and sat there instead of riding?

Mr. Lincoln: Quite right, sir.

The Court: That guarantee is just about as broad as any. It is the safety of the mule, like a safe horse.

Mr. Lincoln: I expect to connect up the fact that this——

The Court: He has already testified he had told him he had never ridden a horse or mule, and told them to pick a mule for him that was all right;

(Testimony of Elmer H. Mateas.)

the mule took him up the trail safely, when he started to buck when he came back, so I can't see how that adds anything to what is already in the record, because it is not a question of whether all the mules [39] were safe, whether this particular mule was safe to ride, that concerns us.

Mr. Lincoln: Your Honor is quite right, but here is an absolutely unlimited statement of all of these wonderfully safe mules, every mule, not only the one which we rode, but all the rest, not only all the rest, but the one which we rode.

The Court: In the face of the testimony you have given——

Mr. Lincoln: I was going to ask leave to introduce this circular, anyway, but I wanted to ask him one other question in relation to that clause as to whether he believed it or not.

The Court: All right.

Mr. Lincoln: I suppose my learned opponent will object to that, too.

The Court: He has got to protect his rights. We are not making the law, we are merely following the law that the courts of California have laid down as to conditions of recovery.

Mr. Lincoln: Your Honor is quite right, of course.

The Court: You have tried on the defendant's side as well as the plaintiff's to protect his client's rights. Objection overruled. You may answer. Read the question.

(Question read by the reporter.) [40]

(Testimony of Elmer H. Mateas.)

Q. By Mr. Lincoln: Now, the question is, did you read that paragraph before the 17th of June?

A. Yes, sir.

Mr. Schell: May we have the same objection?

The Court: Yes. Overruled.

Q. By Mr. Lincoln: Did you believe it?

A. Yes, sir.

Q. I now show you what seems to be some bills here, one headed F. E. Cox; one the El Tovar Hotel; one of the Grand Canyon Hospital; and ask you *if have* seen those bills before?

A. Yes, sir.

Q. Were those the bills which were rendered to you by Dr. Cox and by the hospital?

A. Yes, sir.

Q. For the treatments which you received after your injury? A. Yes, sir.

Q. That of Dr. Cox being in the sum of \$90; the hospital being \$145.50; and this bill of the El Tovar \$3.57; you paid that, did you?

A. My wife has ordinarily. I know nothing about it.

The Court: Don't you pay your wife's bills?

Mr. Lincoln: That happens to be paid, your Honor. It is marked paid. I don't know who paid it.

The Court: A lucky man if he doesn't have to pay his [41] wife's bills.

Mr. Lincoln: Yes, sir. We will now offer this circular heretofore, this circular Exhibit 1 for identification, now in evidence.

(Testimony of Elmer H. Mateas.)

Mr. Schell: You are offering it in evidence now?

Mr. Lincoln: Yes.

Mr. Schell: I am objecting to it as incompetent, irrelevant and immaterial, and not within the issues as framed by the pleadings.

Mr. Lincoln: The witness identified it as being a circular which he obtained from the El Tovar and which describes the trail trips.

The Court: Let me see it.

(Circular shown to and examined by the Court.)

The Court: All right. Objection overruled.

The Clerk: 1 in evidence.

The Court: It may be received.

Mr. Lincoln: We now offer, your Honor, bills of Dr. Cox and the Grand Canyon Hospital.

The Court: All right. Be received.

The Clerk: Plaintiff's Exhibit 5.

Mr. Lincoln: Your Honor, I have just received word that Dr. Sloan, who lives and has his office in Inglewood, and whom we desire to call as a witness for the plaintiff, has some operations scheduled for this afternoon, and tomorrow he has practically every moment filled for matters [42] which he has to attend to for the United States Army. He says, however, that he can, if your Honor can make such arrangement, be present here today at half past one; his reason for that being as I suggest, he has an operation almost immediately afterwards, just as soon as he can get

(Testimony of Elmer H. Mateas.)

away. I assume his testimony will be somewhat short; it will be confined to what he has discussed with me Mr. Mateas' condition to be when Mr. Mateas returned to Los Angeles from Grand Canyon. I wonder if it would be possible and suit your Honor's convenience, and that of counsel, if we might recess until 1:30?

The Court: Well, I have no objection to convening at 1:30.

Mr. Lincoln: In speaking with Mr. Schell, your Honor, he says——

Mr. Schell: I will accommodate you, counselor.

Mr. Lincoln: I appreciate that very deeply. I was about to suggest, your Honor, it might be possible if your Honor would recess at this time for Mr. Schell's convenience——

Mr. Schell: No, go right ahead.

The Court: I can't get out. Furthermore, I want to say, gentlemen, that there is a very urgent matter which I had to continue until tomorrow morning, and it is a type of matter I don't know how much time it will take; it is a very hotly contested matter relative to a judgment I rendered some time ago and involves a receivership, and also some [43] other matters, and I must hear it tomorrow morning, so it may well be that it will be necessary to take the morning for that matter, and not hold a session until in the afternoon, in which event I may convene at 1 o'clock tomorrow so as to conclude this case, because I have a criminal case scheduled for Thursday.

(Testimony of Elmer H. Mateas.)

Mr. Schell: If we can depend upon that and arrange that now, I would appreciate it very much.

The Court: I can't tell that now. I have to be governed by what goes on every day. I can't tell. I don't mind working long hours and it may be that we can get through today.

Mr. Lincoln: We will do the best we can.

The Court: If the case is not concluded today I cannot hold a morning session tomorrow; rather than call you at 11 o'clock for an hour, I would rather call you at 1 o'clock, and then hear that matter, rather than break the session and have a 4-hour session tomorrow.

Mr. Schell: That would be very satisfactory.

The Court: I am going to tell you that because that is a matter that came up yesterday, because I am negotiating a possible adjustment of the matter. If counsel does that, it won't be necessary; if they don't, it will take time and it will be necessary.

Mr. Lincoln: That is all. Your witness, Mr. Schell. [44]

Mr. Schell: We have no questions, your Honor.

The Court: All right. Step down. All right. Step down, Mr. Mateas.

JUNE MATEAS,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Mrs. June Mateas.

Direct Examination

Q. By Mr. Lincoln: Mrs. Mateas, are you related to Mr. Mateas who has just testified?

A. Yes.

Q. And what is that relationship?

A. He is my husband.

Q. Were you present with him in 1941 when you came to El Tovar, or when he was in the El Tovar? A. Yes.

Q. Was there some discussion between you at that time with relation to taking a Bright Angel trip? A. Yes.

Mr. Schell: I object to that as being immaterial what the discussion was in 1941. [45]

Mr. Lincoln: You are quite right. I am not going to get into that discussion.

The Court: All right.

Q. By Mr. Lincoln: Did you go with Mr. Mateas to El Tovar in 1942? A. Yes.

Q. And when did you leave Los Angeles?

A. We left Los Angeles on the 16th of June, 1942.

Q. And what was your means of transportation?

A. We drove our car.

Q. Did he drive all the way?

A. Yes, he drove all the way.

(Testimony of June Mateas.)

Q. And you arrived—what time did you arrive in El Tovar, do you remember?

A. Well, we arrived about—it was about 7—7 o'clock that evening.

Q. Stop at that hotel?

A. No, we didn't stop at El Tovar. We stopped at the court they have for autoists for accommodations.

Q. At the same time did you discuss with any persons about going—taking this Bright Angel trip?

A. Yes.

Q. And where did this talk take place?

A. Well, it was at the El Tovar Hotel.

Q. Any particular portion of the hotel?

A. Yes, at the ticket agency there, the ticket booth [46] that sells tickets to the various trips.

Q. Was Mr. Mateas there at the time you had this talk?

A. Yes.

Q. What was said between you and this person who sold you the tickets?

Mr. Schell: May we have the same objection, your Honor? Hearsay, incompetent, irrelevant and immaterial, and not having—

The Court: Overruled.

Mr. Schell: —any bearing on the issues.

The Court: Subject to motion to strike.

The Witness: Shall I answer?

Mr. Lincoln: Yes.

A. We just talked about the mules and stated my husband—my husband stated he hadn't had any experience on any mules or horses, and the ticket

(Testimony of June Mateas.)

agent there told him most of the people didn't have that were taken down the trail on mules.

Q. Was that about all the discussion you had on that subject? A. That is about all.

Q. All right. Did you buy a ticket at that time?

A. Yes, sir.

Q. Do you remember what you paid for it?

A. I think we paid \$18 a piece.

Q. Was that for a trip that day or a trip for some [47] other time?

A. That was a trip for the next morning.

Q. The next morning what did you do in relation to taking this trip?

A. Well, we drove our car over to the corrals which are at the top of the Bright Angel Trail, and parked our car there and went over to the corral, looked at the mules that were standing there, and then we went down to the corral and the trail foreman placed us—we waited for him to assign us to our mules.

Q. By the trail foreman do you mean Mr. Bradley, who is in the courtroom?

A. I think that is his name.

Q. The gentleman with the red necktie?

A. Yes, that is right.

Q. Did you have any conversation with him about who should take any particular mule?

A. I didn't, no.

Q. What was the manner of assigning you to a mule, or any persons that you saw?

(Testimony of June Mateas.)

A. Well, he just looked at the person and looked at the mule and then assigned the person to the mule that he——

The Court: Introduced each person to the mule and each mule to the person?

The Witness: That is the general idea.

Q. By Mr. Lincoln: Do you remember what time it was [48] you started down the trail?

A. Not the time we started down the trail, no.

Q. But you got there at what time?

A. Our tickets said to be at the corral at 11 a.m., and we did.

Q. How long did you stay there at the corrals before you went down, approximately?

A. Oh, approximately a half hour.

Q. Was there any other party that was there at the time or went down ahead of you?

A. Yes, there was a party preceding ours that was heading down the trail.

Q. How many people were there in your party?

A. Counting the guide?

Q. Counting the guide, yes.

A. Seven—six, seven—just a minute—there was six or seven.

Q. Where were you in sequence in the string?

A. I was fourth from the end.

Q. And Mr. Mateas was where?

A. At the end.

Q. The guide, of course, at the front?

A. Yes.

(Testimony of June Mateas.)

Q. Did you notice anything unusual with relation to Mr. Mateas' mule on the way down?

A. On the way down? [49]

Q. Yes.

A. Yes, he tried to squeeze past the rest of us a number of times.

Q. Was that on the inside or the outside of the trail? A. On the outside.

Q. By the "inside" I mean the side nearest the canyon wall.

A. No, he would squeeze to the left; that would be the drop side of the canyon.

Q. Did you see him buck at all on the way down? A. Not preceding the accident, no.

Q. That is what I mean. Now, you got to Indian Gardens at what time, if you remember?

A. I don't know.

Q. But at any event, there you had lunch and stopped for a little while? A. That is right.

Q. When you went on from there did anything happen with relation to Mr. Mateas and the mule?

A. Well, at the water trough we stopped to water the mules——

Q. Yes.

A. ——and he got on another man's mule that was there, and the guide made him exchange mules, and then when we proceeded his mule tried to get ahead of the rest of ours.

Q. Now, just a minute. At the water trough when they [50] exchanged the mules, did you have

(Testimony of June Mateas.)

any conversation with the guide, or hear any conversation between him and Mr. Mateas?

A. No.

Q. All right. And so they exchanged mules? And then did they exchange them back again?

A. Yes, the guide told them to revert to their original mules.

Q. Well, then, after that what happened?

A. Well, then we proceeded down the trail towards the bottom of the Canyon.

Q. Yes.

A. And we were just rounding, going through a little dip and into a bend, and the mules were struggling, like they are inclined to do, and Bob, our guide, told us to close up the mules, and he stopped at the head to let the mules close up; of course, the rest of the mules stopped, too, and we would try to urge them on a little, and the first thing I heard, I heard someone scream, and I looked up and the girl in front of me, she had a very horror-stricken look on her face; or was, rather, back of me, and I turned around and I heard a lot of commotion was going on I heard at the same time, and I turned around and as I turned I saw the mule bucking with my husband, and I saw two bucks and the second buck he was thrown over the mule's head.

Q. To the left or the right of the mule?

A. Directly in front of the mule. [51]

Q. Right in front? Where did he land; that

(Testimony of June Mateas.)

is, as far as the ground was concerned, as compared with the trail itself?

A. You might call it on a shoulder of the trail.

Q. And what did you do then immediately after?

A. Well, I immediately dismounted and ran back to see what had happened to Mr. Mateas. This man that was in front of him got down, too, and we tried to help him but he was in such intense pain we could not touch him.

Q. Well, now, what was his posture at that moment? Was he standing, or lying, or what was it?

A. He was just curled up, cramped up; his knees were drawn up.

Q. How long did he remain in that particular position?

A. In that position it was about four hours.

Q. During that four hours did you remain there? A. Yes, I stayed right by him.

Q. Did the other party go on, or the balance of the party go on?

A. The rest of the party, except our guide and this gentleman stayed with me.

Q. The others went on?

A. The others went on.

Q. That is, the ladies of the party continued on; is that it? A. Yes, sir. [52]

Q. And then some time after that, did anybody come to where you were?

A. At 7 o'clock that evening a party came down, including the doctor.

(Testimony of June Mateas.)

Q. And what did the doctor do?

A. The doctor gave my husband a shot in the arm and a pill of some sort, and then they tried to straighten him out and move him to a blanket, but——

Q. Just a minute. Did that “shot” you speak of have any effect in relieving his pain?

A. Very little. He is not susceptible to hypodermics.

Q. When they attempted to move him what effect did that have on him as you observed?

A. As I remember, his pain was so intense and terrific at that time that he cried out with the pain and asked them not to move him, not to touch him.

Q. Did he gradually get straightened out, finally?

A. Well, they straightened him out—just below his legs it started.

Q. Was he left to lay on the ground?

A. They moved him to a blanket on the trail.

Q. And then was there any discussion about—withdraw that question—was there any discussion between the guide and this physician who came down, or whoever it was, with regard to taking him back, or how they would take him back? [53]

Mr. Schell: That is objected to as immaterial, what discussion may have been had between the doctor and the guide; I don't see the materiality of that.

(Testimony of June Mateas.)

The Court: I don't see the materiality. I suppose I can take judicial notice he was in pain; anybody falling and hurting his back will suffer pain.

Mr. Lincoln: There was something else, your Honor, which I did not like to indicate to the witness, if your Honor will bear with me and permit the answer to the question, subject, of course, to counsel's motion to strike it out, I think your Honor will consider it material. It is not an idle question.

The Court: Well, all right. Overruled. Go ahead.

The Witness: Will you state it again?

Q. By Mr. Lincoln: I am talking about whether there was any discussion as to how he should be taken back.

A. Well, yes, they said they would have to send for a litter-bearing—a litter to bring him back up to the top.

Q. Well, did they? Afterwards was he taken back?

A. Yes, after a time, when they brought a litter down.

Q. Now, will you describe that litter to us, please?

A. Well, the litter is a canvas and it seems to me it had pipe framed around it, and it has—they have a specially-constructed saddle for the mule; it is on the order of a "V", if I remember correctly, and the litter is placed in that "V" and rides—then tied on in some manner [54] and rides with or against the mule, whichever way the mule

(Testimony of June Mateas.)

happens to be, when the mules takes a step the litter bounces one way and bounces the other way, and sways from side to side. There is no stability, at all, to it.

Q. It was on this one mule?

A. Yes, on one mule.

Q. Did you accompany Mr. Mateas on his way back? A. Yes.

Q. Do you know if he suffered any pain during that trip up?

A. He did. He cried out all the way up, and moaned all the way up.

Q. What time did you arrive at the top, do you remember?

A. Well, it must have been around 5 o'clock in the morning.

Q. And where was Mr. Mateas taken then?

A. He was moved to the Grand Canyon Hospital.

Q. And remained there how long?

A. Three weeks.

Q. Where did you stay in the meantime?

A. Well, the first thing, all that morning, half the day I spent at the El Tovar Hotel, and then I spent, I think, three or four days at the auto court, and then the doctor told me I could come and stay at the hospital.

Q. During that entire period did you watch Mr. Mateas? [55] A. I was there constantly.

Q. And observed his condition? A. Yes.

(Testimony of June Mateas.)

Q. Do you know if he suffered any pain during that period?

A. Yes, he did, he suffered all the time.

Q. And for how long a period was he in bed?

A. He was in bed about two weeks.

Q. And how long after that was he in the hospital before he was released?

A. About a week.

Q. Between the time he was in bed and during the period he was in the hospital in that week, what was he able to do, if anything?

A. Well, the first couple of days he sat up on the edge of the bed, but he was too dizzy and sick.

And he had to be put back into bed, and then they put him in a wheelchair and he was in the wheelchair for a couple of days, and then he started to learn to walk over again by pushing a chair in front of him, shoving it and shuffling along behind it.

Q. Do you know whether these mules that went down on this trip with you had any names attached to them?

A. Yes, we all give the name of the mule which we were on.

Mr. Lincoln: Does your Honor recess promptly at 12 [56] o'clock?

The Court: I am going to today, because I am having a short recess. Ordinarily I don't look at the clock and I don't like to stop in the middle of an examination.

(Testimony of June Mateas.)

Mr. Lincoln: Which is all right with us. I am willing to continue.

The Court: I think we will stop because I have an engagement at 12 o'clock to meet another judge, and the time we lose, if any, at the noon hour, we will make up late in the afternoon. So we will declare our recess now until 1:30.

(Whereupon an adjournment was taken until 1:30 o'clock p.m. of this same day.) [57]

Afternoon Session

1:30 o'Clock

The Court: All right. Proceed. Put on your doctor.

Mr. Lincoln: Will you come around, Dr. Sloan?

LEIGH E. SLOAN,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Will you please state your name?

A. Dr. Leigh E. Sloan.

Direct Examination

Q. By Mr. Lincoln: Are you a physician and surgeon, doctor? A. I am.

Q. Licensed to practice in the State of California? A. Yes, sir.

Q. How long have you been practicing in the State of California?

(Testimony of Leigh E. Sloan.)

A. A little over fifteen years.

Q. From what college did you originally attend and graduate?

A. Rush Medical College of the University of Chicago. [58]

Q. When was that? A. 1927.

Q. And you have any other degrees from that—except from that college?

A. I have a B.S. and an M.D., yes.

Q Did you practice in Chicago or Illinois at all? A No.

Q All your practicing has been confined to California? A. It has.

Q. Is that a general practice? Have you specialized in any particular branch?

A. A limited practice now, mostly medicine and some surgery.

Q. By “now” you mean in the last few years?

A. In the last five years.

Q. Do you know Mr. Elmer Mateas?

A. I do.

Q. The gentleman who sits over here behind me? A. Yes, sir.

Q. Did you have occasion to make an examination of his physical condition at some time?

A. I did.

Q. And when was that?

A. I think it was—I have—may I use—

Q. You have some notes?

The Court: Yes; anything to refresh your recol-

(Testimony of Leigh E. Sloan.)

lection. [59] You are not supposed to carry those facts in your head.

The Witness: Yes. The 14th of July, 1942.

Q. By Mr. Lincoln: And where did that examination take place?

A. In my office, 511 East Manchester Boulevard, in Inglewood.

Q. Now, will you please describe the examination which you gave him at the time, and what you observed?

A. He complained of having a pain—he complained of having been thrown from a mule or donkey in the Grand Canyon and had suffered injury to his back, and from which he had been hospitalized, so he told me, approximately three weeks; and he complained of pain in his back on motion, and there was tenderness on examination and limitation of motion due to the pain. X-rays that were taken in our office and read by Dr. Matzen, a Roentgenologist, who interprets our x-ray reports. May I read that report?

The Court: Yes.

A. (Reading). "7-15-42. Lumbar spine and pelvis.

(a) projections of the lumbar spine discloses irregularity of the outline of the right transverse process of the first lumbar segment consisting of a shadow of decreased density traversing the process. This finding is indicative of a fracture."

The Court: No sacro-iliac involved?

(Testimony of Leigh E. Sloan.)

The Witness: No evidence on any injury to the bony [60] structure.

The Court: To the bony structure? Where was the fracture? Does it say?

The Witness: Yes, in the right side in the first lumbar vertebra.

The Court: In the right side in the first lumbar vertebra?

The Witness: The transverse process. I have the x-rays here that were taken at that time.

The Court: Well, do you desire to see them, Mr. Schell?

Mr. Schell: Oh, I think not at the moment, your Honor. I think I can develop what I want on cross examination.

The Court: We have a shadow box, you know.

Mr. Schell: Yes, but I think not. I think I can develop it from the doctor's questioning.

The Court: All right.

Mr. Schell: I think possibly we can. That was incomplete, was it, doctor?

Mr. Lincoln: Mr. Schell,—

The Witness: Well, it wasn't—

(Counsel hold conference outside of the hearing of the reporter.)

Q. By Mr. Lincoln: Now, doctor, tell us whether or not an injury of that character was a painful injury. A. Very painful. [61]

Q. And could you say what treatment of that injury did you suggest?

(Testimony of Leigh E. Sloan.)

A. Well, immobilization and heat, and I referred him to an orthopedist in the city, Dr. Gibboney.

Q. Do you know of any other treatment which would be of any benefit to an injury of this character, other than what you gave?

A. Well, in some cases that are extreme they might go in there and try to take out that fragment.

Q. In this instance you didn't recommend that?

A. I didn't.

Q. Could you say for about how long a period such a condition as this might continue?

A. I cannot say.

Q. Well, is it something——

A. It continues a long while.

Q. It does take a long while?

A. A number of years.

Q. When was the last examination you made of Mr. Mateas?

A. 31st of March, 1943.

Q. And what did you find his condition at that time to be?

A. He still had—complained of tenderness and some limitation of motion, and inability to lift the same things that he previously lifted in his work.

[62]

Q. Would it be possible for you to say, give us any estimate of time in which that condition might continue or be completely remedied?

A. I could not.

Mr. Lincoln: Your witness.

(Testimony of Leigh E. Sloan.)

Cross Examination

Q. By Mr. Schell: Doctor, that was an incomplete fracture, was it not?

A. It was not stated by the Roentgenologist. I have the x-ray if you want to look at it.

Mr. Lincoln: May I have just one question? May I offer these x-rays; that is, these x-rays that were taken at the time? These were the x-rays that were taken at the time, doctor? A. Yes, sir.

The Court: We'd better look at them while the doctor is here. Will you get our shadow box? I am very proud of that; I am the only man in the courthouse here that has one. I got it long before things like that came from the government and nobody has been able to get another one.

The Witness: I think you can see it without a shadow box.

The Court: Well.

The Witness: You can see it better with the shadow box. [63]

The Court: Where is it?

The Witness: Right here.

The Court: Oh, that is where the fracture is?

The Witness: That is right.

The Court: Well, let's not stop. We will get it later.

Mr. Lincoln: That is all.

The Clerk: Plaintiff's Exhibit 6.

The Court: It may be received in evidence.

Q. By Mr. Schell: May I see this report of Dr. Matzen you were referring to?

(Testimony of Leigh E. Sloan.)

A. Yes. This is a copy.

Q. Where is the original, doctor?

A. My secretary or my technician copies the report.

The Court: Put it here. Put it there, and connect it. It is all right now.

(Shadow box placed before witness.)

The Court: Doctor, will you——

The Witness: I think this is—this is it.

The Court: Speak loud enough for the record.

The Witness: This is the seat of injury here to the bone. You see the cortex broken on both sides, completely through there.

The Court: But didn't get across, is that the idea?

The Witness: This is the transverse process. The whole thing broke across there but it is held in place by [64] the ligaments around it. These show the ligaments that connect the bone in the back.

The Court: Is that likely to cause a calcium formation? Likely to immobilize?

The Witness: This may go together again. It is very slow to heal.

The Court: Slow to heal?

The Witness: Yes.

The Court: I see. All right. This show anything, then?

The Witness: No, this shows nothing here. That is the pelvis and the laterals don't show that.

(Testimony of Leigh E. Sloan.)

Q. By Mr. Schell: You have any laterals, doctor, in that area of this first lumbar?

A. You see, this shows that area up here.

Q. That is, so far as this particular picture is concerned, it is negative?

A. It is negative as far as that is concerned. This shows the whole thing. We took two views. If it don't show anything in one direction, it may in another.

Mr. Lincoln: The doctor has testified as to negative "R".

The Witness: That is "right"; "R" for the "right side."

Q. By Mr. Schell: Well, there is an "R" anywhere on there? [65]

A. The only way I can identify it, that is the right side.

Q. Then tell us, doctor, what is that a picture of so we may identify it?

A. This is a picture of the lumbar spine showing the pelvis.

Q. And referring particularly to the two points, which vertebra is that?

A. This is the twelfth thoracic vertebra.

Q. Twelfth? A. Yes.

Q. Also sometimes referred to as the first lumbar?

A. I don't know. I am not an orthopedist. I don't know. We have always spoken of it as the twelfth lumbar. I think he spoke of that area. No,

(Testimony of Leigh E. Sloan.)

it is the first lumbar segment there. It is the first; it is not the twelfth.

Q. In other words, it is the first lumbar; not the twelfth cervical?

A. The twelfth thoracic.

Q. There is no displacement on that, is there?

A. No, not that you can see from that direction. If you get back and the x-ray show directly through it, there might be some such or another, but I don't think that is a fact.

Q. And the other x-ray you took, what direction was that? In that same area? [66]

A. Well, that is the lateral; it is taken from the side.

Q. That shows nothing there?

A. That doesn't show anything.

Q. Doctor, was this the first time you had ever treated this patient?

A. No, no, I had treated him—oh, back in 1936, I think I saw him once before for a wen on the hand; that happened probably about 1932.

Q. Did you ever treat him for any back injury before?

A. He had—I think he lifted something once, I don't remember the details of it, but I believe I saw him just once for that condition, and I think he had some indigestion that didn't necessitate x-rays; that he took some alkalies for and that cleared up.

Q. I take it, doctor, from your testimony, you

(Testimony of Leigh E. Sloan.)

are directing more of your efforts now to internal medicine? A. Yes, sir.

Mr. Schell: I think that is all.

Mr. Lincoln: May I ask just one question, your Honor?

The Court: Yes.

Redirect Examination

Q. By Mr. Lincoln: Doctor, how much was the total charge which you made to Mr. Mateas for the treatments you gave him? [67]

A. I don't know. I think they got a bill. They could probably tell you that.

Q. Well, I will show you this. I show you a bill, doctor, and ask you if that refreshes your memory any as to the amount of your charges?

A. That is probably the bill. I don't know whether it is the items—I don't know whether it is itemized or not.

Q. This matter on the back is not in your handwriting at all, is it?

A. No, that is not in my handwriting. That has been put on since I rendered the bill.

Mr. Lincoln: We will offer this bill, your Honor.

The Court: How much is it?

Mr. Lincoln: \$118.

Mr. Schell: Are you offering just the bill?

Mr. Lincoln: What is on the back has nothing to do with it and we are not offering it at all.

Mr. Schell: I noticed something on the back.

The Clerk: Exhibit 7.

(Testimony of Leigh E. Sloan.)

The Court: That is a reasonable charge for the treatment you rendered?

The Witness: Yes, sir. I don't make the charges. They make them in the office and they are all expenditures, your Honor.

Mr. Schell: That is all. [68]

Mr. Lincoln: That is all. You want these x-rays?

Mr. Schell: You might leave them.

The Court: Leave them with the clerk.

The Witness: Will they be returned as a part of my record?

The Court: Yes, except the one that was introduced in evidence, that cannot be withdrawn unless by stipulation.

Mr. Schell: We will stipulate when it is all through it may be withdrawn.

The Witness: Just a matter of record.

The Court: That is right.

Mr. Lincoln: Well, all right.

The Court: Mark the one that was introduced in evidence and then the other, mark it for identification.

The Witness: This is the only one you need?

The Court: That is right. The others may be marked for identification, if needed.

The Clerk: The one the doctor referred to will be 6, and the other——

The Court: 7 for identification.

The Clerk: No, I have the bill 7, so that will be 6-A for identification.

Mr. Lincoln: You will get them all back.

(Testimony of Leigh E. Sloan.)

Mr. Schell: Could we remove that shadow box?

The Court: Yes; take it down. I don't think we will need it. You won't have any other doctor witness? [69]

Mr. Lincoln: No, we have no more. I would like to recall Mrs. Mateas.

The Court: Come around.

JUNE MATEAS,

recalled as a witness on behalf of the plaintiff, having been heretofore duly sworn, testified as follows:

Direct Examination

Q. By Mr. Lincoln: Mrs. Mateas, just before recess I think that there was a question pending as to whether you could give us the names of some of the mules who were on this particular trip. Do you remember them?

A: Well, I remember my own mule's name, and my husband's mule's name I remember.

Q. What were those?

A. My mule's name was "Ann" and his was "Chigger".

Q. Between the time of this injury to your husband and up to the present time has he suffered any other injury? A. No.

Q. Did you have a conversation with Bob Ennis, the guide, after your husband was thrown from the mule? A. Yes.

(Testimony of June Mateas.)

Q. And where did that conversation take place?

A. That conversation took place on the trail, right [70] beside my husband; we were kneeling there looking at him.

Mr. Schell: Just a moment. Let's take this a little at a time.

Mr. Lincoln: You are quite right, Mr. Schell.

Q. By Mr. Lincoln: Was there anybody else present at that time except your husband and Bob Ennis and yourself?

A. I don't remember. There could have been another gentleman there, but——

Q. Let's get at it perhaps in another way. Were there some other ladies in the party?

A. Yes.

Q. I don't mean at this particular moment but I mean in the party going down.

A. Yes, sir.

Q. And do you remember whether or not those ladies went somewhere else after the accident?

A. Well, I don't remember where they went.

Q. Well, did they go somewhere?

A. Yes, they went somewhere.

Q. But you don't know where? And at the time this conversation took place were any of those ladies participating in it?

A. That I don't remember.

Q. All right. Now, was this conversation in relation to this particular mule which your husband had been riding? A. Yes. [71]

Q. What did Mr. Ennis say while you and your

(Testimony of June Mateas.)

husband were there, if anything? Tell us, please, anything as nearly as you can—just a minute——

Mr. Schell: To which we object, if the court please; that would be pure hearsay, anything that occurred afterwards, not a part of the *res gestae*; no showing this man was in any managerial capacity, or had *anything* authority to make any statement subsequent to the accident, and no showing it would be a part of the *res gestae*.

The Court: I am familiar with the rule which says an employee cannot make any admissions in matters of this character afterwards, but if they are close enough to the time as to explain at the time, they are binding, as I understand it.

Mr. Schell: May I ask the witness?

The Court: When a narrative of past events. If you want to examine him on——

Mr. Schell: If I may, please.

The Court: —how close they are to the happening of the accident, I will let you do that.

Mr. Lincoln: Before that, may I suggest to your Honor the thought which I have in this connection? Naturally, as I take it, the only persons who have any knowledge of the mule, and its antecedents, or its past experiences of the record, are those persons who were in the employ of the Harvey Company. Certainly we could not possibly know [72] anything about the mule, or its proclivities, if it had any, and the only way, therefore, by which we would be able to present to this court what those persons knew.

(Testimony of June Mateas.)

The Court: Of course, you plead the other way. Your pleading is this mule never carried persons.

Mr. Lincoln: All right.

The Court: In fact, you are going to show he is a balky mule with persons; so you will have to amend your pleadings to conform to your proof, if he is balky.

Mr. Lincoln: I expect to prove just exactly what I have alleged in the complaint, but I have to prove it, of necessity, I respectfully submit, by persons who knew and not by ours.

The Court: Of course, nevertheless, the rule does apply that if it is a narrative of past events it is not competent. You are familiar with that rule, because an employee who is like a driver of a vehicle, or driver of a street car, cannot bind the company by any statement unless it is right at or about the time. He cannot relate other things.

Mr. Lincoln: No, sir, that is quite true, but we submit that in this particular instance, and other instances, which I hope to be able to present, these persons could show, and the only persons who could show, what this mule had done at past times.

The Court: Well, I think we are talking at cross [73] purposes, what you are capable of proving and the rules of evidence which limit the declaration by which an employee can bind his employer. That is all. All right, you may examine her on voir dire.

(Testimony of June Mateas.)

Q. By Mr. Schell: How long after this accident did this conversation take place?

Mr. Lincoln: Objected to as immaterial.

The Court: Overruled.

Mr. Schell: You may answer.

The Witness: What was the question again, please?

Q. How long after the accident did this conversation with Mr. Ennis take place?

A. Well, you want approximately the time?

Q. Yes.

A. Well, about five or ten minutes.

Q. It might have been as long as fifteen?

A. Well, I don't know. I am just giving an approximate amount.

Q. Had the other people left the scene of the accident before the conversation took place? [74]

Mr. Lincoln: The same objection. May I have the same objection to all this line of examination, your Honor?

The Court: Overruled. You may answer.

The Witness: Had they left, did you say?

Mr. Schell: Yes.

A. That I cannot say. I don't remember whether they had left or not. I was upset. I remember that, if you are interested, I was kneeling talking to Bob.

Q. By Mr. Schell: I am interested just in the question.

The Court: In fixing the time.

(Testimony of June Mateas.)

The Witness: I cannot give any definite statement on time, Mr. Schell.

Q. By Mr. Schell: In other words, it was some time after the accident but you can't tell just exactly just when; is that right?

A. No, I cannot.

Mr. Schell: That is all.

The Witness: It was just right after.

The Court: All right. Go ahead.

Q. By Mr. Lincoln: What was the conversation?

Mr. Schell: I object, no sufficient foundation laid to show this is a part of the *res gestae*.

The Court: Oh, yes, I will overrule the objection. Go ahead. you may answer.

Q. By Mr. Lincoln: Which you had with Mr. Ennis and your husband concerning the mule. [75]

A. Oh, well, I was kneeling there and Bob was kneeling beside me there trying to make him a little comfortable, and Bob said that was the first time the mule had been down the trail. That was the general gist of the conversation.

The Court: All right.

Mr. Lincoln: Your witness.

Cross Examination

Q. By Mr. Schell: You had ridden from the rim of the Canyon up there, south rim, down to Indian Gardens; is that right?

A. That is right.

(Testimony of June Mateas.)

Q. And then after you got to Indian Gardens you stopped for lunch? A. Yes.

Q. Could you tell us approximately how long it took you from the rim of the Canyon down to Indian Gardens? A. I cannot now.

Q. I mean was it a matter of minutes or hours?

A. It was a matter of hours.

Q. A matter of two or three hours, something like that? A. Yes, I would say so.

Q. Now, you left around 11:00 in the morning, sometime around 11:00 o'clock? A. Yes.

Q. And would you say it was 1:00 or 1:30 when you arrived at Indian Gardens? [76]

A. It could have been 1:00 or 1:30.

Q. Well, you say "could have been," I mean is that approximately?

A. That is an approximate figure, yes.

Q. And then how long after you left Indian Gardens did you ride before this accident happened?

A. Well, it was approximately a half to an hour, a half hour to an hour.

Q. A half an hour to an hour? A. Yes.

Q. In other words, from the time you had mounted again at Indian Gardens until the accident was somewhere between a half hour and an hour? A. Yes.

Q. And you had been riding more or less continuously all that time? A. Yes, that is right.

Q. Hadn't made any stops to dismount in the interim? A. No.

(Testimony of June Mateas.)

Q. And you say the mule that your husband rode was "Chigger"? A. That is right.

Mr. Schell: I think that is all, your Honor.

Mr. Lincoln: There is one question which I may have if I am permitted, your Honor?

The Court: Go ahead. [77]

Q. By Mr. Lincoln: Do you know, or did you, at that time know or meet a guide by the name of "Bob"? A. "Bob"?

Q. Yes.

A. He was our guide—Bob Ennis.

Q. Or who was "Bill"?

A. I know his name to be that now.

Q. You did meet him, did you?

A. At Indian Gardens.

Q. And what was his position with relation to your party?

Mr. Schell: Just a moment. If I understand I think it would call for a conclusion of the witness, what his position was.

The Court: I don't know what he did. Let's see. Go ahead. You may state what was he doing.

Q. By Mr. Lincoln: What was he doing?

A. He was a guide.

Q. Of your party? A. Of another party.

Q. Of another party? A. Yes.

The Court: Oh, of another party?

The Witness: Yes.

Q. By Mr. Lincoln: Did you have any conversation with him in relation to this mule that your husband was riding? [78] A. At which time?

(Testimony of June Mateas.)

Q. Any time. A. At any time?

Q. Yes. A. Yes, I did.

Q And when? A. In the hospital.

Q. How long after the injury?

A. It might—about a week and a half.

Q. Was anybody else present at that time?

A. No, just my husband and myself.

Q. What was the conversation?

Mr. Schell: Just a moment. To which we object.

The Court: Oh, that is clearly outside of any rule. That is clearly outside of any rule. It is not competent, an admission of an employee as to past events, you can prove almost anything that way. The objection will be sustained.

Mr. Lincoln: Will your Honor bear with me for a moment, please, sir? Will your Honor say—

The Court: I am not saying. I am just ruling.

Mr. Lincoln: I understand, sir.

The Court: I am governed by the rules of evidence, and this case comes to us from the State courts and we are governed by the rules of evidence of the State courts, and you cannot prove negligence by an admission of somebody else, an employee, made a long time afterwards. I allowed the [79] other because it was so close to the event as to be a part of the *res gestae*. You couldn't, if you had a street car accident, you could not produce some employee and by virtue of a statement made three months afterwards, or two weeks afterwards, or a

(Testimony of June Mateas.)

week, wouldn't prove something was wrong with the street car at that time, or the way she was treated, and that is exactly the rule by which you are governed. The manner of proof is not an argument. I know what your argument is going to be, you have another way of proving it, that is not an argument. The manner of proof does not create law. You cannot prove negligence on the part of an employer by a statement of somebody long after the event.

Mr. Lincoln: We now offer to prove by this witness that in this particular conversation with this man named Bill, who was one of the guides employed by the Harvey Company on this Bright Angel Trail at the particular time and place which the witness has already testified to, this man stated to her that he knew this mule, and the the mule had always been fractious since he had been purchased by the Harvey Company to be used by the Harvey Company.

The Court: All right.

Mr. Lincoln: That is all.

Mr. Schell: I take it, we should for the purposes of the record, object to the offer of proof.

The Court: Yes.

Mr. Schell: As incompetent, irrelevant and immaterial, [80] and hearsay.

The Court: Objection sustained. The objection will be sustained.

Mr. Lincoln: That is all. Mrs. Rayle, come forward, please.

MRS. ALICE RAYLE,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your name.

A. Mrs. Alice Rayle.

Direct Examination

By Mr. Lincoln:

Q. Mrs. Rayle, do you know Mrs. Mateas, who just testified on the stand here?

A. Yes, I do.

Q. And Mr. Mateas, her husband?

A. Yes, I do.

Q. Are you related to either of them?

A. No.

The Court: Speak louder, Madam, so we can all hear you.

By Mr. Lincoln:

Q. When did you first meet either of them?

A. The first time I saw them was when we were getting ready to get on our mules.

Q. Now, when was that?

A. At the corral getting ready to take the trip down. [81]

Q. In 1942? A. Yes.

Q. Have you been in the courtroom this morning? A. Yes.

Q. And heard the testimony which has been given? A. Yes.

Q. And you are referring to the trip of the

(Testimony of Mrs. Alice Rayle.)

Bright Angel Trail at which Mr. Mateas was injured; is that right? A. That is right.

Q. You have seen this photograph of the persons in the party, have you, which was taken at the time? A. Yes, I have.

Q. And you are among that party?

A. I am.

Q. Do you remember the particular place where Mr. Mateas was thrown, from the mule?

A. Well, I remember the occasion; I don't know what you mean by particular place, except it being the trail.

Q. You remember the place with reference to, for example, Indian Gardens, whether above or below Indian Gardens? A. Below.

Q. And do you remember how long after you had left Indian Gardens that this accident took place?

A. No, not exactly. I know it was around 3:00 o'clock.

Q. Well, after the accident where did you go? [82]

A. We went down to a little river is a place and stayed there for a couple of hours until another guide came.

Q. Do you know the name of this other guide?

A. His name is "Jerry."

Q. He was the guide of some other trail party?

A. Some other party, yes.

Q. Did you have any conversation with him

(Testimony of Mrs. Alice Rayle.)

either there or elsewhere with relation to this particular mule?

A. Not that I know of. I don't recall any.

Q. Did you meet at that time a guide by the name of "Bob"?

A. "Bob" was our guide.

Q. He was your guide? A. Yes.

Q. Well, did you have any conversation with him at that time, or at some other time, in relation to this mule? A. Yes.

Q. And at what time was that?

A. That was the following day, coming back.

Q. Had you been—did you go as far as Phantom Ranch this first day? A. Yes.

Q. When you were at Phantom Ranch did you write any report or record of this happening?

A. Yes, sir.

Q. (Addressed to Mr. Schell): Do you have that, Mr. Schell? [83]

Mr. Schell: The only thing I have, I don't have the original; I have been trying to locate it, but I have a copy, if you wish it you may have it.

The Witness: I had practically nothing to write. The conversation you mention——

Mr. Lincoln: Wait a minute.

The Witness: ——happened the next day.

By Mr. Lincoln:

Q. Now, this conversation which we are referring to, where did that take place?

A. That was the next day returning on the trip.

(Testimony of Mrs. Alice Rayle.)

Q. On the trail? Was anybody present except you and Bob?

A. Well, the rest of the party, of course, had been——

Q. I mean engaged in this conversation.

A. No.

Q. What did he say?

Mr. Schell: To which we object as not a part of the *res gestae*. It is the following day.

The Court: I don't know of any rule, Mr. Lincoln,—if you will point me to any case in California that allows this, I will be glad to listen to you, but it is clearly forbidden by the law of California to prove negligence by statements of employees made long after the event. If you know any other rule I would be glad to listen to you, and show me or tell me the book, and I will get it.

Mr. Lincoln: I am sorry, I don't have the book or page [84] which will be of assistance to me.

The Court: Well, give me a statement somewhere. Have you got any law book?

Mr. Lincoln: No, sir, I haven't a thing in the world.

The Court: The law is the other way.

Mr. Lincoln: I have been mistaken in the law so many times, it is also possible I am in error this time, but I want to make such record as I may here.

The Court: It is not a question of making a record. I am always willing to learn. I am in my *seventeenth* year and I learn things every day. If there is something in the law or opinions on this

subject I am unfamiliar with, I would be glad to have you point it out to me. As it is the law, as I understand it, clearly states when it comes to proving negligence against an employer a statement of an employee is only admissible if it is made right at or about the incident. Any explanation of what took place by a narrative of past statements made later on are narrative past events, and are not binding upon the employer.

Mr. Lincoln: But your Honor cannot find the word "negligence" in my pleadings. I am basing this——

The Court: It is not.

Mr. Lincoln: I am basing this not on the negligence theory. Now, the case of Dam against Lake which, of course, your Honor is familiar with,——

The Court: Yes. [85]

Mr. Lincoln ——in that case they had two entirely separate causes of action; one for the breach of a warranty and the other one for negligence. It seems to me wise, and my feeling has been, predicated upon the theory of a breach of a warranty. Now, I respectfully submit that if I sell to you a piece of machinery, for example, which I warrant is fit for the purposes for which you intend to use it, and I can produce an employee who says, "I knew that particular piece of machinery was no good long before it left the place; I have been using that for years and the boss himself knew that it was no good," I submit that that is competent evidence.

The Court: Your case is still a case in tort, an action in tort, not an action on a contract. You see, a piece of machinery would be a different proposition, fitness for particular use, but here it is negligence, you see, it is still based on a tort; it is not—if this were an action, you see, brought before he had bought a mule and he was represented as gentle you see, and you brought an action, you might be able to prove that he was not gentle, was known not to be gentle, because it would be an action upon a contract. Here your action is still a tort but arising out of this contract that was made. It is still a tort and the measure of damages is the injury he sustained. Therefore, the rule which would apply to a sale of a piece of machinery that was defective does not apply in a case of [86] this character, but the rule would apply which applies to torts. You are suing here for failure of duty flowing from the contract.

Mr. Lincoln: Of course, I am sorry your Honor and I look at the matter differently.

The Court: Pardon?

Mr. Lincoln: I am sorry your Honor and I look at the matter differently, but I still think that I should be permitted to introduce these conversations as being the only possible way in the world that anybody can ever know anything about an animal; if the persons who take care of the animal are not entitled to tell what the animal's condition is, then it is very obvious that nobody in the world

could ever prove anything with regard to an injury sustained from an animal.

The Court: Oh, no, no. The Kersten case shows how that is proved. Let's get the case. It shows clearly how it was done. They produced the persons who had ridden the mule in the past and showed that he performed in a similar manner and that evidence was held admissible.

Mr. Lincoln: Of course, we can't prove that.

The Court: But this is merely an answer to your statement it is impossible to prove it.

Mr. Lincoln: In the 52nd Appellate (2d)—52 Second—Cal. (2d)—the Kersten case.

The Court: Let's have those old cases. [87]

Mr. Lincoln: I have that here. Your Honor has the Kersten case? That is on page 1.

Mr. Schell: Page 1?

The Court: In the Kersten case, you see, three persons were offered, they were witnesses that were produced that prior to the day of the accident had ridden a horse, and they testified that the horse was a spirited horse, and the court held that presented a factual case to the jury. It was also shown there that the defendant in the case refused to allow Dr. Kersten's daughter Alice to ride the horse on that ground. Now, I don't know about the Dam case.

Mr. Schell: That is 395, your Honor.

The Court: I don't think this throws any light. "We agree with the appellant that it is not always necessary"—I am reading from page 400 of this

Dam case—"We agree with the appellant that it is not necessary—always necessary for the appellee to prove actual acts of misbehavior on the part of the horse prior to the accident but, in some way, the appellee must prove such facts as would justify a jury in finding that at the time and place in question the horse was unsafe and unsuitable for the purposes for which it was hired."

I doubt, as a matter of fact, that on a strict contractual basis you could prove by a declaration of an employee made long after the particular event had occurred, that there was a defect in the particular piece of machinery, although it [88] may well be that there might be some justification there, because if a piece of machinery is broken and an employee had worked on it, he may be able to testify, but I can't see how you are going to prove a failure of warranty by statements made by an employee later on to the effect it was known to be a fractious horse.

Mr. Lincoln: Well, I grasped three words in the decision which your Honor read. The words "in some way" I respectfully submit that the testimony which I am seeking to introduce comes within the three words "in some way." That is to say—

The Court: But you see the main point though is this, we are still bound by the proposition that an employer—an employee, you see, cannot bind the employer except under certain circumstances. He can bind the employer by things done in the course of his employment, by statements or declarations relating to the business for which he was hired.

Mr. Lincoln: I agree with your Honor perfectly and that comes precisely within the purview of what I am attempting to prove. These men were hired to take care of the mules. Mr. Harvey, if he were alive, or the corporation itself, had no personal knowledge of the peculiarities of these mules, but these men who handled the mules did; these men were acquainted with the mules.

The Court: That is not the point.

Mr. Lincoln: They were almost friends with the mules, [89] and they knew exactly what this mule was.

The Court: Other acts which will justify a declaration as to past events are not binding on an employer, except in very limited circumstances.

Mr. Lincoln: I think this is one of the limited circumstances.

The Court: I don't know. I will declare a recess and you can go into the library and look up the law, if you can find any law which says that you can prove a failure of duty by this character of evidence, by declarations made by an employee later on, either a week after an accident, which I have already excluded, or a day after the accident which concerns us now, I would be very glad to overrule myself and allow not only this evidence to go in, but reopen the case so as to allow you to include testimony given on the previous occasion, I mean which I have excluded; I would be very glad to do so and overrule myself. I know of no law, or principle of law, that warrants that, and while I refer to the

cases as negligence the rule is exactly the same as I conceive it, because the warranty is breached by the failure of a duty, and that is the duty to ascertain in advance, you see, the character of the horse, and to say that you would be in a position to maintain that these people had knowledge before this hiring was done of the mule.

Mr. Lincoln: Precisely what I am trying to prove. I say we shall show that these people did have knowledge of [90] this particular mule.

The Court: But you can't prove it by what this mule did.

Mr. Lincoln: I am proving it by their own knowledge.

The Court: While I declare a recess I will find you the law in a few minutes myself. It is your duty to come prepared on the matters of this character, if not a trial brief at least to have the law to sustain your position when you are confronted with this principle of law which is so well established. I will declare a recess. I will try to find the law on this subject.

(Short recess.)

The Court: Before you pursue the inquiry, I want to read into the record the result of my research, and after running through the cases I am more than ever satisfied that the ruling is correct, and that it is the general rule.

The rule is not limited only to cases based on negligence, but the ruling which prohibits admissions or declarations of an employee after events is grounded upon the doctrine of responsibility. Now,

it does not mean you could not produce an employee at this time, and in this court, who could testify that he knew at the time that this mule had particular qualities, or that certain events happened, but what the ruling is that you cannot prove the fact by declarations made by an employee subsequent to the event, because the employee has no authority to bind the employer by such statements. [91]

Now, I have gone through a long list of cases and I picked out four cases, and they are nearly forty years old, covering a stretch of forty years, to show the continuity of the principle, and the first case is the case of *Beasley vs. San Jose Fruit Co.*, in 92 Cal. 388, decided in 1891, and that was an action brought by an employee against an employer for negligence, for injuries sustained through a fellow employee. That was, of course, the day before the present system of liability was established, which abolished the fellow servant rule.

In that case—I am reading the entire statement to show how broad the court's statement of law is, and this case is cited in the last case I have here from the 22nd Appellate (2d), showing there is a continuity in the rule——

“For the purpose of showing that Henning was careless and that his carelessness was known to defendant at the time he was put in charge of the elevator, it was testified on behalf of the plaintiff that on the evening of the day on which the accident occurred Wright, who, as the foreman of the defendant, had employed Henning, visited the plaintiff at his house and in a conversation with him

said, 'Mr. Henning had been a careless man before that and they knew it; he set their place on fire a few days before; that accidents had happened before with him and that the company ought not to have kept him as long as they did.'

"Testimony of what Wright had said to the plaintiff on [92] that evening after the accident was not competent to prove the fact that Henning was careless and didn't in any respect bind the defendant. The admissions of an agent not connected with the transaction to which they refer cannot bind his principal, even though made in explanation of an act previously by him while in the exercise of his agency. Much less can his opinion bind his principal with reference to a transaction with which he was not connected. The opinion of an agent based on past occurrences should never be received as an admission of his principal's, and this is doubly true when the agent was not a party to those occurrences.

"The declarations of an agent, or servant, do not, in general, bind the principal. To be admissible they must be in the nature of original, and not hearsay, evidence. They must constitute the fact to be proved and must not be a mere admission of some other fact," and so forth.

Now, we have a clear statement later on. Here is a case in the 171 Cal., Willard vs. Valley Gas & Fuel Co., and in that case the court applied it then to a case where the doctrine of *res ipsa loquitur* applied, and that is where the happening of the acci-

dent in itself was sufficient proof on the part of plaintiff, because it was an agency which the plaintiff controlled. It was an explosion which had occurred after the gas—an employee of the gas company had tinkered with the appliances. This is *Willard vs. Valley Gas & Fuel Company*. The court said on page 16—the [93] opinion was written by Judge Melvin, and concurred in by the whole court; reading from page 16, this is 171 Cal.:

“The court erred in admitting testimony of Mrs. Willard in relation to declarations of Mills made after the explosion that he had ‘turned off the wrong thing’, and so forth. This statement was made after the explosion and after the efforts of Mrs. Willard and Mr. Mills to put out the fire, but just how long afterwards does not appear. It was shown, however, that Mr. Mills had retired to the road, and then immediately making the statement he went away. The statement was not a part of the *res gestae* and should have been excluded. That defendant was materially injured by the admission of the testimony there can be no doubt.”

Now, here is another case. The date of this case is 1915. It is another case—1932—*Bodholdt vs. Garret* 122 Cal. App., 556, at page 569. This applies with great cogency to this case because it was an action brought under a special statute which made counties and municipalities liable for personal injury resulting from defective condition of public property where the officers had knowledge of the defective condition. In other words, similar to this case where the cause of action lies in know-

ing the bad quality of the mule prior to the accident.

“One of the plaintiff’s witnesses immediately after the accident inquired of an injured plaintiff as to his condition, and thereafter walked across the street to interview the [94] defendant Garret. By question and answer the witness elicited the information from Garret, the truck driver in the employ of the city, that the collision was due to a broken spring on the front portion of the truck.

“Appellants complain that the trial court erred in instructing the jury that this statement or admission of the driver was in no way binding upon the defendant, the City of Oakland. Statements of an employee not part of the *res gestae* and not made spontaneously, or as the result of excitement from the accident, are not binding upon the employer. While it is true that time is not the controlling element of the matter of *res gestae*, still the statements must be not only contemporaneous but voluntary and the result of excitement, and made before a person has time to calculate and consider the form and substance of the explanation.

“There is no evidence in this case to indicate that the particular statement was caused by excitement, and hence the ruling of the trial court cannot be disturbed.

“Appellant further contends that no objection was made by respondent to this evidence and that the court erred in striking the statement from the record. The court on its own motion, in the inter-

ests of justice, may exclude incompetent and inadmissible evidence.”

I am not reading other transactions of the doctrine of *res ipsa loquitur* that applies, and that is not important. [95]

Now, here is a later case than that. In this case, dated May 13, 1938, *Wills vs. Price*, 26 Cal. App., (2d), 338, the opinion written by Judge Haines, concurred in by Judge Jennings and Judge Marks.

In that case that was an action where the doctrine of *res ipsa loquitur* applies, and that is that the linoleum had fallen off a rack and struck a customer on its premises. Of course, that is a situation that calls for the application of the doctrine of *res ipsa loquitur*. They tried to show that similar occurrences had occurred and the court had this to say:

“With respect to those matters we entertain no doubt”—wait a minute—yes—the court reads—here is reference to admitting evidence that the linoleum had in the same room toppled over and fallen on other occasions, both before and at the day of the accident, and also its refusal to allow Mrs. Wills, and her sister, Mrs. Willits, to testify to a conversaton that Pauline Thomas, an employee of the store, in which it is claimed the latter admitted knowing of such occurrences. The court said:

“With respect to these matters we entertain no doubt that it would be competent to admit evidence of previous accidents occurring under substantially

the same general circumstances as the one under investigation, both as tending to show the cause of the latter and if appellants were shown to have notice of them as tending to establish [96] negligence on their part."

And then they say, "The rule as to evidence of subsequent accidents is different. We are unable, however, to find from the record any instances in the present case of the rejection of testimony respecting such previous accidents, save only the court's refusal to allow Mrs. Wills and Mrs. Willits to testify to statements above referred to, claimed to have been made by Pauline Thomas. This proffered testimony on the part of Mrs. Wills and Mrs. Willits was, in our opinion, properly excluded."

And they say, "Because it does not appear"—I am not reading the entire paragraph—

"Even though Mrs. Thomas was an employee of the store that she had any connection with handling the linoleum or keeping it in order, or the room where it was handled," and so forth. But they add, "More than that, however, this statement on Mrs. Thomas' part, whatever they may have amounted to, were extrajudicial, and having occurred after the accident were no part of the res gestae, and that, therefore, mere hearsay," and here they advert to that case of *Beasley vs. San Jose Fruit Company*, from which I read, in the 92nd California; and *Bodholdt vs. Garret*, 122 Cal. 566.

So we see that the court has applied it to a variety of causes of action, both a case where the

duty was imposed to bring home to the municipality, or the officers of the municipality, knowledge of a defective condition of [97] equipment, and applied it to the case where the doctrine of *res ipsa loquitur* came into play, which means cases where the very occurrence of this accident is sufficient *prima facie* proof that the defendant is liable for it.

The collision between the railroad trains on the same track, because of the presumption that as the railroad is in sole control, the very happening of the accident is sufficient to throw the burden upon them to prove that it was not due to any negligence on their part. Then they have applied it to those cases and, of course, there are hundreds of cases. The Digest, which I consulted, had under paragraphs 283, 285 and 286, of the Chapter On Evidence, conservatively not probably 75, but I would say hundreds, that is the construction in conservatively 75 cases arising from accidents, automobile drivers, employees, and the others, and the theory, as I say, is derived from the relation of employer and employee, and the effect of the statement of an employee, to allow an employee to bind the employer by a subsequent statement, why, would lay the employer open to all sorts of dangers. A man might go to a bar and long after something happened, and under the influence of liquor, tell a lot of things. Before you could bind the employer you would have to, if you are going to bind the employer by that, why, you would establish a rule and a relationship which is not warranted by the cases. So I felt certain that the rule could not be

limited to just negligence, because [98] it is a rule of agency rather than a rule—than a rule limited to negligence because, although, of course, it has been more frequently invoked in negligence cases; there are cases even relating to statements as to the circumstances in which a contract was made where the circumstances were in dispute, and admissions of an employee made long after the events were held not to be binding upon the parties.

So while I say if you can bring these witnesses in and have them state they knew, of course, that is primary evidence, but you cannot bind the employer by declarations made either a day after, or a week and a half after, under the rule of evidence as I understand it; and, of course, under the new rules we are—we follow the rules of evidence of the State where we sit because Congress has not prescribed any rules of evidence in the Rules of Procedure, nor by any other Act, and while the rules say that the policy of liberality should follow, and we should rule in cases of doubt in favor of an admissibility, which is merely a prescriptive rule, or rules, and do not mean that the so well established principle which relates to hearsay should be disregarded, because if we did then, of course, if you are going to disregard the hearsay rule in an ordinary case then there is no rule of evidence; we are coming to the Continental system which obtains on the continent of Europe, which is so hard for us to understand, where everything is admissible both in a civil and a criminal action. You can [99] enter a French court, and a German court, or in a

Russian court, because they are not bound by the common law rules of evidence. You can tell what somebody's housemaid told somebody else's maid, and go away back into all sorts of ramifications and bring them before the court and have the court weigh them, but the rules of evidence which are established in the English-speaking courts have excluded hearsay, and they declare statements or declarations of an employee not made contemporaneously and as a part of the conditions in which he participated, but purely narrative of past things, are not binding on the employer. And in the light of that, why, I must exclude this testimony.

Mr. Lincoln: May I then, your Honor, make an offer of proof?

The Court: If you want to you may. I don't think it is necessary because the question you have asked, and your statements, clearly indicate the nature of the testimony you want to elicit, but if you want to, you may.

Mr. Lincoln: It was only just a very short conversation.

The Court: All right.

Mr. Lincoln: I think perhaps if the court will allow me, we offer to prove by this witness that the guide, Bob Ennis, told her on the particular day and occasion, which she has already referred to, that the particular mule which had been ridden by Mr. Mateas the day before, had not been down this particular trail, or had not been ridden by any passenger [100] that season. That is all.

Mr. Schell: To which also we object, your Honor, as being incompetent, irrelevant and immaterial; being purely hearsay and not part of the *res gestae*.

The Court: Well, I think also in addition to that, I think it is also immaterial because that is not an element in the proof of this case.

Mr. Lincoln: That is correct, your Honor.

The Court: Whether it has been completed or not is immaterial. It is not a fact the first time a mule had been ridden—we are not dealing with a horse that was not broken.

Mr. Lincoln: No, he said the first trip, that was the first trip that season. That doesn't mean anything, anyhow.

The Court: All right. However, I have made the ruling. I think, Mr. Lincoln, the ruling seems to follow the only way you can prove it. I went to all the trouble of putting in the record my reasons for overruling. Of course, I sustain the objection. All right.

Mr. Lincoln: I am going to try it another way. May I recall Mr. Ennis for a few more questions, your Honor?

The Court: All right.

Mr. Lincoln: Mr. Ennis, will you come forward again, please? [101]

EMMET MYRON ENNIS,
recalled.

Further Direct Examination

Q. By Mr. Lincoln: Mr. Ennis, in 1942, in June or July, was there one of the guides who took passengers down on these trips by the name of—with the first name of “Jerry”?

A. Jerry Butler.

Q. “Butler” was his last name? Is that right?

A. Yes, sir.

Q. Another one you remember by the name of “Bill”, and, if so, what was his last name?

A. There was a blacksmith helper by the name of “Bill Basey” that occasionally taken people into the Canyon.

Q. That is, having the same position your son did when he went down with people?

A. No, he was a blacksmith’s helper.

Q. I know, but did he ride down as a guide?

A. Occasionally, yes.

Q. Do you know—did you keep any record of the number of times he went into the Canyon, and what he did with people? A. No, I have not.

Q. Do you have any personal acquaintance with this particular mule that Mr. Mateas rode, presumably his name was “Chigger”, that is, as far as I know?

A. My personal recollection or knowledge of——

Q. No, just answer my question with “yes” or “no”, if you can tell us? [102] A. Yes.

Q. You do know? And how long had you known him before 1942, Mr. Ennis? A. ’38.

(Testimony of Emmet Myron Ennis.)

Q. '38? Where had he been used between '38 and '42, if you know? Or do you know?

A. He was about—from 1938 and 1939 he was in the pack train, being packed and used as a guide mule. The packer rode him occasionally.

Q. Then after that?

A. 1940 he went into the “dude” string.

Q. On the Bright Angel Trail?

A. On the Bright Angel Trail.

Q. That particular year do you know if there were some college boys that rode him?

A. No, I don't.

Q. Do you know where Jerry Butler is now?

A. No, I don't know just where Jerry is at now.

Mr. Lincoln: That is all.

Mr. Schell: No questions. All right.

The Court: All right. Step down.

Mr. Lincoln: Mr. Bradley, please. [103]

JOHN BRADLEY,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Will you please state your name?

A. John Bradley.

Direct Examination

Q. By Mr. Lincoln: Mr. Bradley, are you an employee of the Harvey Company?

A. Yes, sir.

(Testimony of John Bradley.)

Q. And have been for how long?

A. Since 1933, July 13th, I believe.

Q. Now, what particular duties do you perform at the present time, or in 1942, or before?

A. Well, for the past—going on eight years I have been trail foreman; that is, in charge of the guides and of the stock in the trail trips.

Q. As a part of your duties are you also acquainted with the mules?

A. Absolutely; yes, sir.

Q. Do you know this particular mule called "Chigger" that was supposed to have been ridden by Mr. Mateas?

A. Yes, sir.

Q. By the way, how do you spell that name?

A. Chigger?

Q. Yes. A. C-h-i-g-g-e-r. [104]

Q. Thank you. Did you know this mule when it first came onto the place?

A. Yes, sir.

Q. When it was first brought there by the Harvey Company?

A. Yes, sir.

Q. Did you have charge of it from that time on?

A. Yes, sir.

Q. Mr. Bradley, as Mr. Ennis has just testified, for the first year or so it was used on the pack train; that is correct, is it?

A. That is correct.

Q. Until '40? And then in 1940 you used it on the "dude" trains?

A. Yes, sir, it began its "dude" training in the year 1940.

(Testimony of John Bradley.)

Q. Did this mule continue on these "dude" trains from 1940 all the way up to June, 1942?

A. That is right.

Q. Didn't put it back on the pack trains at all?

A. Well, I wouldn't say definitely we didn't at all because we alternate them depending on the season and what stock we might have there, and depending on how much pack and how much guest work we have.

Q. So do you keep any record of the trips that any particular mule takes?

A. No, not any individual. [105]

Q. Whether pack trains or "dude" trains?

A. No, not on any individual mule.

Q. Do you know of any occasion along in the year perhaps 1940 or '41 in which this particular mule had been ridden by some college boys or some high school boys?

A. No, I don't remember any particular occasion but it is very possible that it was.

Q. And they stuck spurs into him and made him buck?

A. No, absolutely not, because that is my job to see no one mounts with spurs. Even the guides never ride with spurs.

Q. Did they do—or they had done anything to him to cause him to buck?

A. I never had any report of that kind.

Q. Did this fellow Jerry ever tell you anything of that kind? A. No, sir.

Mr. Schell: Just a minute.

(Testimony of John Bradley.)

Mr. Lincoln: You are safe. He says no.

Q. By Mr. Lincoln: Did anybody ever report to you that this mule had bucked before the summer of 1942?

A. No, sir, that is the first time it was ever reported.

Q. Do you know whether or not this particular mule had carried any passengers in the summer of 1942 before the 17th of June?

A. No, it hadn't, not in 1942. [106]

Q. That is what I mean. And where had the mule been before the summer of 1942?

A. He had spent the winter months at our ranch south of the Canyon, Del Rio Ranch, that is the company's pasture.

Q. Just in a pasture?

A. Yes, it is a ranch—agriculture and pasture.

Q. So that this particular trip was his first trip down?

A. That year, yes.

Q. That year? A. Yes.

Mr. Lincoln: That is all.

Mr. Schell: That is all.

The Court: Step down.

Mr. Lincoln: Mrs. Vogel, please come forward.

MRS. ELLA W. VOGEL,

called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

The Clerk: Please state your name.

The Witness: Mrs. Ella W. Vogel.

Direct Examination

Q. By Mr. Lincoln: You are Mrs. Ella W. Vogel? A. Yes, sir.

Mr. Lincoln: I am presenting, your Honor, and if the court will permit me, this particular testimony perhaps against your Honor's ruling, but simply for the purpose of [107] making such record as might be of some value, and I am not certain whether in view of your Honor's ruling it would be of any value, nevertheless I would like permission to present it.

Q. By Mr. Lincoln: Mrs. Vogel, were you one of the parties who was on this trip in which Mr. Mateas was injured? A. I was.

Q. Are you related to either Mr. and Mrs. Mateas? A. No.

Q. In any way? A. No.

Q. Did you ever see them before you met them on this particular trip? A. No.

Q. You are in that picture, are you, Mrs. Vogel, somewhere? A. I am.

The Court: Yes, the third person right there.

The Witness: The second.

The Court: Right there?

The Witness: Yes, that is me.

The Court: All right.

(Testimony of Mrs. Ella W. Vogel.)

Q. By Mr. Lincoln: After Mr. Mateas was injured did you remain at the place where he was thrown off?

A. For about 20 or 30 minutes.

Q. And during that time did you have any conversation [108] with Bob Ennis, the guide?

A. Well, we were all talking—I don't know—I don't know as I had any particular conversation with him.

Q. All right.

A. We were all talking back and forth.

Q. You went from there where?

A. We went from there—Bob took us down to Indian—to the river house.

Q. And there did you meet a guide by the name of Jerry, or Butler, I believe the correct name is?

A. Well, not until later.

Q. When was it you met him?

A. I believe they phoned him; I believe he was at Phantom Ranch and they phoned him to come down and meet us and take us to Phantom Ranch?

Q. Anyway, you met him? When was it you first met him? A. About 5:00 o'clock.

Q. That same day? A. Yes.

Q. Did you have any conversation with him then with regard to this particular mule?

A. No.

Q. All right. Did you have a conversation with anybody with regard to this particular mule?

A. I had a conversation with Jerry later in the evening.

(Testimony of Mrs. Ella W. Vogel.)

Q. Oh, I see. Well, I am sorry I missed my time then. [109] By "later in the evening" do you mean about what time?

A. Well, it was after 10:00 o'clock in the evening because we all went in swimming and I had been in swimming and was sitting at the side of the pool talking to these people.

Q. Was anybody else participating in that conversation?

A. Yes, there were two school teachers.

Q. Do you know their names? A. No.

Q. Strangers to you, were they? A. Yes.

Q. I see. Now, don't answer this question, please, until Mr. Schell has an opportunity to object to it, and his Honor has an opportunity to rule on it. What conversation did you have at that time with Jerry, the guide, concerning this mule?

Mr. Schell: To which we object; it is incompetent, irrelevant and immaterial.

The Court: Yes.

Mr. Schell: And hearsay, and not a part of the *res gestae*.

The Court: Yes. Objection sustained.

Mr. Lincoln: We now offer to prove by this witness that at this particular time and place this guide, Jerry Butler, stated to this witness that he knew this particular mule, and that the summer before the mule had been ridden by a [110] bunch of college boys who had spurred the mule and got him to bucking, and thereby had ruined the mule; that in consequence it was no further—they couldn't

(Testimony of Mrs. Ella W. Vogel.)

use the mule upon this trail, but they had taken it over to the north rim on a pack train, and had brought it back earlier this year, and this was the first trip which the mule had made with any passengers this season.

Mr. Schell: To which offer of proof we object as incompetent, irrelevant and immaterial, and hearsay, and not tending to prove or disprove any issue in this case.

The Court: Well, on the basis of the rulings previously made, and for the reasons previously stated in the record, the objection is sustained.

Q. By Mr. Lincoln: Did you overhear a conversation, Mrs. Vogel, between Mrs. Mateas and Bob Ennis at the scene of the accident, shortly after the accident?

A. I may have but I don't recall it.

Q. Don't remember it? A. No.

Mr. Lincoln: All right. That is all.

Mr. Schell: No questions.

The Court: All right.

Mr. Lincoln: I am sorry, your Honor, but that seems to be all we have.

The Court: Well, all right. Do you rest?

Mr. Schell: Do you rest? [111]

Mr. Lincoln: We have to.

Mr. Schell: We move for a non-suit and make a motion to dismiss this action, no proof of any breach of any warranty that the mule was of a not fit and proper character. In other words, there is no evidence here showing either negligence or any

breach of warranty on which a possible recovery could be had; and we submit that all of the testimony shows, and that all the testimony does show, is that on this particular ride the mule bucked when he—after he had been out four or five hours, and he bucks and the plaintiff fell off, and that is the sum total of anything and is certainly no proof of any breach of warranty, or negligence, or failure to comply with the statute; and, furthermore, the allegations in the complaint are that this mule had never been ridden before and this was his first trip; he had always been used as a pack mule for times before, and plaintiff's affirmative proof shows the mule had been ridden by the so-called "dude" for at least two years prior to the happening of this accident.

The Court: All right. Mr. Lincoln, you want—

Mr. Lincoln: Under your Honor's ruling I have no answer to that. I think if there is any question as to the proof, however, we should be permitted to amend to conform to the proof, in that it makes no particular difference perhaps in the final analysis; any slight question as to whether the mule had been ridden this year, or whether for the first time, [112] or whether it had been ridden this year on this trip for the first time, I don't know that it makes any difference in so far as our proof or plaintiff's is concerned.

The Court: Gentlemen, ordinarily when I try a case without a jury I am rather—I am rather re-

(Testimony of Mrs. Ella W. Vogel.)

luctant to grant a dismissal; although, of course, as you understand, under our new rules a dismissal if upon the ground that the plaintiff has not shown any right to relief at the conclusion of his case, is an adjudication on the merits.

I am always reluctant to do that despite the fact that in our Federal Courts we are not bound by the scintilla of evidence rule which the Supreme Court of California has promulgated in many cases, which makes it almost impossible to ever sustain a non-suit, unless there is an absolute failure of proof, as it were. We have never followed that, but the rule we say is if there is any substantial evidence to—that there must be substantial evidence before the court will put a defendant upon his proof whether the case is tried by the court alone, sitting without the jury, or with the jury, and if there were any kind of an inference that could be drawn from this record, I would put on the proof, I would put the defendant on his proof so as to decide the matter upon the basis of the entire story as narrated to me by all of the parties concerned, but it would be just a waste of your time, and my time, because the record absolutely shows no basis for liability. [113]

The evidence elicited, or sought to be elicited through declarations, is already in the record by testimony of witnesses produced by Mr. Lincoln, whom he called as his witnesses and employees of the company, who stated positively that this was not the first time that the mule had carried passengers; it was the first trip that year, but I can't say, with

all that, that that is the basis of liability. The basis of liability is the one set forth in Paragraph 9 of the Complaint, and that is that defendants knew, or should have known, that the mule was not at all suitable, or fit to be used for the purpose for which it was provided, and was not a safe mule to be ridden in such place under such circumstances and conditions, and by a person wholly unfamiliar with riding either horse or mule.

That is the basis of liability and there is no testimony whatsoever that anybody knew of any trouble that this mule had. Of course, the lone declarations which were offered might, to some degree, have substantiated this, but I am so satisfied on the basis of the law as I find it that they were inadmissible, that I have in front of me a record which shows just exactly that this mule just bucked after he had been ridden by the same person for several hours.

Had the buck thrown his rider when the trip first began, as soon as the rider got on him, we might have said, "Nice mules should not behave like that," so following the doctrine of *res ipsa loquitur*, or something like that, so that there [114] is no escape from the conclusion that the plaintiff has failed to show any facts to which would entitle him to relief.

As much as one may regret the fact that somebody is injured through apparently no fault of his own, ultimately we cannot compensate a person for injuries unless it be shown that they were caused by the neglect of a duty which somebody else owed them, and there is no such in this record.

The motion to dismiss will, therefore, be granted.
Mr. Lincoln: Very well.

The Court: All right. Ten o'clock tomorrow morning.

[Endorsed]: Filed April 17, 1944. [115]

[Endorsed]: No. 10783. United States Circuit Court of Appeals for the Ninth Circuit. Elmer H. Mateas, Appellant, vs. Fred Harvey, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed May 27, 1944.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10,783

ELMER H. MATEAS,

Appellant,

vs.

FRED HARVEY, a corporation,

Appellee.

STATEMENT OF POINTS UPON WHICH AP-
PELLANT INTENDS TO RELY UPON
APPEAL

To the Appellee Above Name and to Its Attorneys,
Messrs. Schell & Delamer.

You and each of you are hereby notified that the above named Appellants intends to rely upon the following points upon his appeal from the judgment entered in favor of the Appellee in the above entitled action by the District Court of the United States for the Southern District of California, Central Division, to wit:

(1) That the conversations between Bob Ennis and Mrs. June Mateas; and between Bob Ennis and Mrs. Alice Rayle; and between Mrs. Ella W. Vogel and Jerry (or) Butler, should have been received in evidence.

(2) That the objections to the offers of proof of the above respective conversations should not have been sustained.

(3) That by reason of the fact that the Appellee maintains several strings of mules over a period of many years for the purpose of carrying supplies and excursionists, up and down various trails to and from the south rim of the Grand Canyon, constitute such pack trains public carriers.

(4) That by reason of the circumstances set out in paragraph 111 hereof, the Appellee was an insurer of the safety of all persons carried by said mules on such excursions.

(5) That there was an actual or implied *warranty* given by Appellee to Appellant when Appellant purchased his ticket for the excursion, and when he read the advertisement and relied upon it.

(6) That there was a breach of such *warranty* which was brought to the attention of Appellee when the mule ridden by Appellant was skiddish or fractious on the trail, and when Appellant changed mules.

(6) That the unreliability of the mule's disposition was twice brought to the attention of Appellee before the time of the injury.

(7) That when Appellee would not permit Appellant to change mules, Appellee became responsible for the results which followed.

(8) That when the proprietor of an excursion trip such as this holds out to the excursionist that the apparatus, or animals are safe, and an excursionist *if* thereafter injured without fault on his part, the owner is liable in damages for said injury.

To the Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit:

You are hereby notified that the above named appellant desires to have printed as the record on appeal the entire record as certified by the Clerk of the District Court of the United States in and for the Southern District of California, Southern Division.

WALTER GOULD LINCOLN,
Attorney for Appellant.

(Affidavit of Service by Mail.)

[Endorsed]: Filed June 15, 1944. Paul P.
O'Brien, Clerk.

No. 10783.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ELMER H. MATEAS,

Appellant,

vs.

FRED HARVEY, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

WALTER GOULD LINCOLN,
1113 Lincoln Building, Los Angeles 14,

Attorney for Appellant.

FILED

AUG 1 1944

PAUL P. O'BRIEN,
CLERK



TOPICAL INDEX.

	PAGE
Statement of the pleadings and facts disclosing the basis upon which it is contended the District Court had jurisdiction.....	1
Statement of pleadings and facts disclosing that this court has jurisdiction to review the judgment in question.....	3
A concise statement of the case.....	4
Argument and law applicable to the facts.....	8

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Archibald v. Schutz, 14 Cal. App. (2d) 420.....	3
Associated v. Railroad, 176 Cal. 518.....	17
Barrett v. Metropolitan, 172 Cal. 112.....	15
Brice v. Bauer, 108 N. Y. 28.....	15
Brown v. Sterling, 175 Cal. 563.....	3
Clowdis v. Fresno, 118 Cal. 315.....	11, 15, 16, 17
Con v. Hunsberger, 224 Pa. 154.....	14
Dam v. Lake, 6 Cal. 395.....	12
Fererira v. Silver, 38 Cal. App. 346.....	12, 14
Ficken v. Jones, 28 Cal. 618.....	13, 17
Hammond v. Melton, 42 Ill. App. 186.....	13
Heath v. Fruzier, 50 Cal. App. (2d) 598.....	14, 18
Kersten v. Young, 32 Cal. App. (2d) 1.....	12
Moore v. Moffett, 188 Cal. 1.....	3
Moore v. Steen, 102 Cal. App. 729.....	3
O'Callaghan v. Dellwood, 242 Ill. 336.....	18
Opelt v. Al. G. Barnes, 41 Cal. App. 776.....	18
Roberts v. Griffith, 100 Cal. App. 456.....	13
Shannon v. Central School, 133 Cal. App. 124.....	18
Smith v. O'Dell, 215 Cal. 714.....	18
Southern Pacific v. Railway Commission, 13 Cal. (2d) 89.....	18

STATUTES.

Civil Code, Sec. 2180.....	17
Civil Code, Sec. 2191.....	17
Code of Civil Procedure, Sec. 963.....	3

TEXTBOOKS.

Cooley on Torts, 406.....	15
---------------------------	----

No. 10783.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ELMER H. MATEAS,

Appellant,

vs.

FRED HARVEY, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

Statement of the Pleadings and Facts Disclosing the Basis Upon Which It Is Contended the District Court Had Jurisdiction.

In this action the appellant sought to recover damages from Appellee, Fred Harvey Company, a New Jersey Corporation, by reason of injuries sustained when bucked off a mule owned by Appellee, and ridden by Appellant in an excursion pack train in Grany Canyon, Arizona, for which transportation Appellant had paid a fee to Appellee.

The injury occurred June 17, 1942.

The action was filed in the Superior Court of the State of California, in and for the County of Los Angeles on May 28, 1943, numbered 485744.

Appellee made a motion to transfer to the District Court of the United States for the Southern District of Cali-

fornia, Central Division, on September 13, 1943, upon the ground of diversity of citizenship and the amount in dispute being over \$3,000.00. [6-7.]

A bond on removal was filed and approved by said Superior Court October 1, 1943. [11-12.]

The order of removal was granted, and a written order therefore made October 1, 1943. [13-14.]

Certificate of the clerk of said Superior Court was filed October 1, 1943.

The action was thereupon transferred to the said District Court of the United States, No. 3179Y Civil, and proceedings thereafter were held in said Court in said action.

Issues were joined [28] on an amended complaint. [16.]

Trial was held January 18, 1944. [27.]

At the close of Appellant's testimony (there being none introduced by Appellee), the Appellee made the following motion [28]:

"We move for a non-suit and make a motion to dismiss this action, no proof of any breach of any warranty that the mule was of a not fit and proper character * * *." [134.]

After considerable argument the Court made the following order:

"The motion to dismiss will, therefore, be granted."
[138.]

It is from this motion for non-suit and the judgment of dismissal following [29] that this appeal is taken. [30-31.]

Statement of Pleadings and Facts Disclosing That This Court Has Jurisdiction to Review the Judgment in Question.

The rule with relation to non-suits is this:

The party making the motion must specify the grounds, and the Court will consider only those which were so specified.

24 A. C. 77, pages 87 and 88.

The defects of the proof of the plaintiff must be called to his attention so that he may supply the missing evidence if possible.

24 Cal. App. 81.

If a party fails to state the particular grounds upon which the motion is based, it should be denied.

139 Cal. 603;

Brown v. Sterling, 175 Cal. 563, and cases there cited;

Archibald v. Schutz, 14 Cal. App. (2d) 420.

Where an appeal is taken from a non-suit the evidence must be resolved most strongly in Appellant's favor.

Moore v. Steen, 102 Cal. App. 729;

Moore v. Moffett, 188 Cal. 1.

“An appeal may be taken from a Superior Court
* * * from a final judgment entered in an action
* * *.”

Cal. Code of Civ. Procedure 963.

A Concise Statement of the Case Is as Follows:

The Colorado River in Arizona is at the bottom of Grand Canyon, about a mile below the south rim, but some eight miles by a trail four to six feet wide [39] which reaches the river by following the contour of the canyon wall.

Defendant Fred Harvey Company has maintained a hotel and tourist outfit at the south rim of this canyon, at a resort known as El Tovar, for a period of at least 38 years. [38.] As a portion of its service has maintained, and did maintain on the date in question, a number of mules, which were used partly for transportation of "anything" to and from the bottom of the canyon [40] and for excursion parties who were taken to the river as sight-seers, up on this trail.

These mules were selected by the defendants' employees [40] and were trained to carry passengers, by having them (the mules) used for a year or two in packing supplies only. [40.] Then they were put on the passenger excursions, not more than ten to a party [43], presided over by a guide, who rode in front (evidently to establish the pace of the troupe).

These mules were kept in a corral, maintained by the Harvey Company, and when a number of persons were gathered at the time established by defendant company for the tour to commence, the corral manager would designate which mule each was to ride.

They rode in single file, and the pace was a walking pace.

Elmer Mateas and his wife came to El Tovar on June 16, 1942. The next day they went to a booth [52] in the hotel where tickets were sold for the mule trip down the

trail. Mr. Mateas told the attendant he had never ridden any mule, or horse [51-2] and the attendant told him in reply that 70% of other persons who had taken the trip had never ridden, either. Mr. Mateas had also received a circular in the hotel, which read in part:

“Trail Trips Into the Canyon. Although visitors may venture short distances down these trails on foot, the accepted mode of travel for longer journeys is by the famous Grand Canyon mules. These faithful, sure-footed animals, in charge of experienced guides, hold a 30-year record of carrying many thousands of inexperienced riders down the trails and back in perfect safety.” [Ex. 1.]

He believed these statements in the circular, and also those of the clerk. [70.] He paid the clerk the necessary fee for the excursion for himself and his wife, and received two tickets. [53.]

The next day, June 17, 1942, he and his wife went to the corral where the mules were. Another party was just leaving, and there were but seven persons left. The trail master pointed out a mule which Mr. Mateas was to ride, and he mounted that mule. [44-45.] He was the last one in the string. Bob Ennis was the guide, a boy about 18 years old. He had been accustomed to horses since he was three—so his father said. He was in front. As Mr. Mateas started out he let the reins lie idle, but was approached by the trail master who told him he must keep them in his hands at all times. [55.]

On the way down the mule ridden by Mr. Mateas would suddenly try to squeeze through the other mules and get over the line, away from the end of the line—try and squeeze through the trail—get in front.

“He tried to squeeze past the rest of us a number of times—on the drop side of the canyon.” [78.]

Indian Gardens is about three and a half miles down—a stopping place both going and coming. [49.]

Before the party reached there, a Mr. Boles who rode the mule immediately in front of Mr. Mateas, discussed the mule situation, and, as Boles was an experienced rider, he offered to change mules.

At Indian Gardens (where the party stopped for lunch) [78] Boles and Mateas traded mules. [58.] Starting from here when they were on the mules, Bob Ennis came back—checking up—and saw they were on different mules.

“We told him why we had changed—that I could not handle the mule I was on; Mr. Boles said he could handle any mule and we wanted to trade over. Ennis made us return to our original mules.” [59.]

“After we had rested at Indian Gardens I lined up at the water trough; the mules drink before we start off; the mule tried to start off as before, to break loose. [59.] The result was the same as previously. I was told to rein him in, or put him back in the line. A little bit later he ran off, and this time I tried to rein him in and he went into a buck and threw me off.” [60.]

“At the water trough we stopped to water the mules and he (Mr. Mateas) got on another man’s mule who was there, and the guide made him exchange mules,

and then when we proceeded his mule tried to get ahead of the rest of ours." [78.]

They exchanged the mules back. "The guide told them to revert to their original mules * * *."

"And we were just rounding, going through a little dip and into a bend, and the mules were struggling, like they are inclined to do, and Bob, our guide, told us to close up the mules, and he stopped at the head to let the mules close up; of course, the rest of the mules stopped, too, and we would try to urge them on a little, and the first thing I heard, I heard someone scream, and I looked up and the girl in front of me, she had a very horror-stricken look on her face; or was, rather, back of me, and I turned around and I heard a lot of commotion was going on I heard at the same time, and I turned around and as I turned I saw the mule bucking with my husband, and I saw two bucks and the second buck he was thrown over the mule's head.

Q. To the left or the right of the mule? A. Directly in front of the mule."

"Just right after the accident Bob Ennis told Mrs. Mateas that this was the first time the mule had been down the trail. [101.]

This particular mule had not carried any passengers in the summer of 1942 before the 17th of June. He had spent the winter months in the company's pasture; this particular trip was his first trip down that year. [130.]

The foregoing statement condensed from the transcript of the record with reference to the respective pages there-to, contains those portions of the testimony to be relied upon by Appellant.

(In addition, there was testimony as to the extent of the injuries sustained by Appellant, which is not material to this appeal.)

Argument and Law Applicable to the Facts.

We assume this Court will take judicial notice of the following facts:

That a horse is not a mule.

That the two animals, being bred differently, have not the same peculiarities of temperament, any more than does an American, as contrasted with a Japanese.

That a horse or a mule, which has been on pasture all winter until the middle of June, has more vim, vigor and vitality than a similar animal which had been working during the same period.

The Harvey Company must have known these same facts, and must have known every fact with regard to this particular mule, when none of the facts were known, or could have been known, to Plaintiff-Appellant.

Many cases have been reviewed by Appellant, in this, and other jurisdictions—all based upon the law relative to livery stable keepers and riding academies.

While the rule of law relating to such types of business is in some degree applicable to the situation before us, the circumstances are radically different.

When a livery stable rents a horse it places that animal immediately and conclusively beyond its control, although in such cases the drive would take place upon a level road, or highway.

In the riding academy cases the animal is also ridden upon a level highway, or road, and is (whether inside a building or out of doors) subject to the control and peculiarities of the rider. The riding academy guide, or teacher, if there was one, has no control over the animal.

In the present case the guide undertook absolute control over all the animals in his charge, and placed himself at the head of them so they must follow his lead.

The conditions differ in other ways from the livery stable cases:

(1) Appellant called to the attention of appellee the fact that he had never ridden either horse or mule, and he was thereupon assured in writing, and by word of mouth, that he would be perfectly safe with whatever animal was selected for him. (2) This particular mule was selected by the employee of Appellee. Appellant had no choice. (3) This trip was not upon a public highway by a wide, smooth, well-travelled road way, but down a steep incline, following the contours of the cliff, and only four to six feet wide.

On one side the perpendicular cliff; on the other a sheer drop of unknown depth. In all, a very dangerous position for an inexperienced rider, unless he is given an extremely gentle, well trained and readily manageable animal.

Much argument has been presented in many cases to the effect that the proprietor of an animal must have knowledge of its incorrect deportment, or vicious disposition, before he can be charged with injuries attendant upon such deportment. This is evidently based upon the old theory that "every dog is entitled to his first bite," a theory which is rapidly being placed in the limbo of obsolete laws. As-

suming, however, that such a rule could be relied upon by Appellee, assuming, also, that the evidence does not show any vicious, improper, or incorrect, mannerisms of this mule *before* he was mounted by Appellant.

Nevertheless, the acts of the mule from that time on, until he bucked Appellant off, shows conclusively that he did not like to be ridden; that he did not intend to be ridden; that he had a nature which was entirely improper for an animal which was to be used in such a hazardous occupation.

It cannot be said that Appellant had any control over this animal, because: Appellant wanted to let the reins loose as he saw other people doing, but on two different occasions was told to hold them tight; and before the party reached Indian Gardens Appellant's mule was insistent upon forcing its way past the mules in front of him, shows that Appellant could not control him.

When the party reached Indian Gardens this condition of lack of control, and the propensity of the mule, was told to the guide—an employee of Appellee.

This desire on the part of the mule to push its way forward was very dangerous—not only to its rider, but to the passengers ahead of it in the string.

If Mr. Mateas' mule pushed between the side of the cliff and the mule ahead of him there was an opportunity to push that forward mule off the trail. If, on the contrary, he tried to pass the forward mule on the left side, he placed himself between the mule ahead and the unprotected side of the cliff—and any movement of the mule so passed might precipitate the passing mule and its rider to their death.

To compel such an inexperienced rider to continue on a mule which had such an intense desire was almost to compel the rider to commit suicide.

Assuming, that the peculiarities of this mule had never before been brought to the attention of any employee of Appellee, nevertheless such propensities were brought directly and definitely to the attention of the guide at Indian Gardens. A Mr. Boles, a member of the party who saw Appellant's continuing danger, and claimed to be an experienced mule rider, offered to exchange mules. Undoubtedly if the guide had permitted this exchange to be made, Appellant never would have been injured. But the guide, knowing these conditions, knowing how the mule had already acted and reacted for nearly half of the way down the canyon, nevertheless insisted that Appellant remain upon this dangerous animal.

If Appellee did not know before that this animal was vicious and dangerous, he knew then. Knowing such danger and insisting that Appellant continue to ride the mule, certainly Appellee brings itself directly within the language of the California Supreme Court in the case of *Clozedis v. Fresno*, 118 Cal. 315 (quoted later.)

(5) That there was an actual or implied *warranty* given by Appellee to Appellant when Appellant purchased his ticket for the excursion, and when he read the advertisement and relied upon it.

"Plaintiff had a right to assume that repeated assurances of the gentleness of the mule and the team of which the mule was a part, were well-founded and true, notwithstanding that the actions of the mule coming under his observation must have generated in

his mind some suspicions that the animal was not so gentle and tractable as not to require expert watching and handling * * *.”

Fererira v. Silver, 38 Cal. App. 346, 351.

In the ordinary contract of hiring of a horse or mule to be used to ride, the owner of the animal warrants

“against defects or vicious habits which he knows, or by the exercise of proper care could know; and if he fails to exercise such care and it occasions injury to his customer he will not be relieved of liability, though he did not actually know the horse was unsuitable for the purpose * * *.”

Dam v. Lake, 6 Cal. 395, page 400;

Kersten v. Young, 32 Cal. App. (2d) 1, page 6.

We have already suggested two instances of evidence supporting this principle of warranty—when the ticket was purchased, and when the ad was read.

(6) That there was a breach of such *warranty* which was brought to the attention of Appellee when the mule ridden by Appellant was skiddish or fractious on the trail, and when Appellant changed mules.

The breach of this warranty occurred as soon as the acts of the mule were brought to the attention of Appellee's employee. When the employee insisted that Appellant continue to ride upon a mule which Appellant himself believed to be dangerous—the liability of the master attached. Even assuming there had been none before.

“In all cases where, by the conducting of any lawful business, the lives and limbs of human beings are placed in peril, the law requires of the proprietor and

managers of that business the utmost care and diligence * * *

“The burden was upon the plaintiffs to prove, in the first instance that he received the injury for which he sought redress; that such injury was done by animals of defendant described in the complaint, and that it happened without fault on his part.

“These facts proved, afforded *prima facie* negligence on the part of defendant, and then the burden of proof became cast on them to show that the injury did not occur by reason of any default on their part.”

Ficken v. Jones, 28 Cal. 618, 626.

“The owner of a domestic animal is bound to take notice of the general propensities of the class to which it belongs, and if such propensities are of a nature to cause injury, he must anticipate and guard against them.”

Hammond v. Melton, 42 Ill. App. 186.

“All men know that a horse which has been stabled and well fed will, when turned out, run, plunge and become dangerous in the midst of people.”

Roberts v. Griffith, 100 Cal. App. 456, 458.

“Common experience justifies the observation that the average work horse or mule, having been thoroughly ‘broken’ to harness and the ordinary burdens cast upon horses, is so gentle in his relations with those using him for the purpose to which he has been educated—that is, is so bereft of nervousness and of an inclination to become nervous, that the mere blowing of a bag of paper in front of him or near him would have no effect upon him.

“In truth, it is commonly known that a blowing of a steam whistle (etc.) does not disturb in the least the ordinary work horse in these days.

On the other hand, it is well known that the slightest noise or disturbance of any character will often arouse to a high pitch the nervousness of a spirited or high strung horse. Such an animal is generally looking for such trouble from natural fears, he is ready to run or become unmanageable from the slightest cause, which would not disturb the average work-horse. Such animal is naturally wild in disposition, and dangerous, and it is just such a horse that a master should never give over to his servant to use without first acquainting the servant with its dangerous disposition.”

Fererira v. Silvey, 38 Cal. App. 346, 352.

“A well established general rule is that the owner of a dangerous or vicious animal who has knowledge that it is such an animal, is liable for any injuries it may inflict upon another, unless such other person voluntarily or consciously does something which brings the injury upon himself.

Heath v. Fruzier, 50 Cal. App. (2d) 598.

A mare hired out by a livery stable, suddenly, without any apparent cause, started to kick violently and ran off.

“He warrants that the horse is not unruly or vicious, but is safe, manageable and suitable for the use for which the customer has hired it * * * in his contract of hiring he impliedly engages that he knows, or has exercised reasonable care to ascertain the habits of his horse, and says to a customer that the horse which he lets is safe and suitable for the purpose * * *.”

Con v. Hunsberger, 224 Pa. 154.

“The knowledge by a servant to whom is entrusted the care of the animal is knowledge to a master sufficient to render the latter liable.”

Barrett v. Metropolitan, 172 Cal. 112, 119.

“The rule is, however, that a servant’s knowledge to whom an animal is entrusted, of its ferocious disposition, is knowledge to the master sufficient to render the latter liable.

Clowder v. Fresno, 118 Cal. 321;

Brice v. Bauer, 108 N. Y. 28;

Cooley on Torts, 406.

(6) That the unreliability of the mule’s disposition was twice brought to the attention of Appellee before the time of the injury.

(This point has already been discussed.)

(7) That when Appellee would not permit Appellant to change mules, Appellee became responsible for the results which followed.

(This point has already been presented.)

(8) That when the proprietor of an excursion trip such as this holds out to the excursionist that the apparatus, or animals are safe, and an excursionist *if* thereafter injured without fault on his part, the owner is liable in damages for said injury.

In the following case two employees were driving a six-year-old bull upon a public highway. Twice he had charged. A third time he charged, tossed, and injured plaintiff.

“It is well settled in cases such as this that the owner of an animal, not naturally vicious, is not liable for an injury done by it, unless two propositions are established: First: That the animal is in fact vicious;

and Second: That the owner knew it. Thus if an animal may be of peaceable disposition, while in charge of a master or servant, suddenly and unexpectedly, through rage or fear, inflicts injury, either is responsible, if at the moment he was in the exercise of due care.

“But, conversely, the owner of such an animal knowing its vicious propensities is liable for injury inflicted by it upon property, or upon a person of one who is free from fault.

“Twice before on that very day had the bull evinced its ugly disposition by attacks actual and threatened. Here was ample proof of the fact of viciousness and of the knowledge of that fact brought home to the master.”

Clowdis v. Fresno, 118 Cal. 315, 320.

At the outset of the drive, when the men (employees) may be assumed to have believed that the beast was gentle, if it had suddenly and unexpectedly attacked and injured some person, it might well be argued that they were performing their task with due care, and that in an unexpected onslaught the master was not liable.

“But when thereafter while engaged in this undertaking, they acquired knowledge of the animal’s evil propensities, it became a question of fact for the jury whether or not they exercised the requisite degree of care in their subsequent management of it. The circumstance that the additional knowledge was acquired by them, and was not known either to them or to their employee in the moment it commenced, would not exonerate the latter.

“If the conductor of a passenger train should at any time during the journey discover a defective wheel, and continuing the trip, injury should result

thereby, the company would not be exonerated because the knowledge was acquired after the train has started.

“Yet there is no difference in principle between the cases, what difference exists is merely in the degree of care exacted by law.”

Clowdes v. Fresno, 118 Cal. 315, at 321-322.

(3) That by reason of the fact that the Appellee maintains several strings of mules over a period of many years for the purpose of carrying supplies and excursionists, up and down various trails to and from the south rim of the Grand Canyon, constitute such pack trains public carriers.

(4) That by reason of the circumstances set out in paragraph 111 hereof, the Appellee was an insurer of the safety of all persons carried by said mules on such excursions.

“The rule of law governing in the case under consideration rests for its foundation as that of which the duties and liabilities of the carriers of passengers are governed. * * * ‘A’ Carrier has to convey his passenger safely and securely; and because of the value of human life and limbs, the law requires the utmost degree of care and skill in the management of the means of conveyance, and will hold the proprietor liable for the slightest negligence.”

Ficken v. Jones, 28 Cal. 618, 627.

“A common carrier is one who undertakes generally and for all persons indefinitely to carry goods for hire.”

Associated v. Railroad, 176 Cal. 518;

Civil Code 2180, 2191.

The real test between private carrier and common carrier is:

“Where he is holding out, so long as he has room, to carry for hire the goods of every person who will bring goods to him to be carried.”

Smith v. O'Dell, 215 Cal. 714, at 718;

Shannon v. Central School, 133 Cal. App. 124, at 128.

“Common carriers are public utilities.”

S. P. v. Railway Commission, 13 Cal. (2d) 89.

Even a “scenic railway” is a common carrier.

O'Callaghan v. Dellwood, 242 Ill. 336.

“The liability of the owner is absolute, in such case, and he is bound to keep the animal secure, or he must suffer the penalty for his failure to do so, * * * the gist of the action is not the manner of keeping the vicious animal, but the keeping him at all with knowledge of the vicious propensities. In such instances the owner is an insurer against the acts of the animal, and one who is injured without fault, and the question of the owner's negligence is not in the case.”

Opelt v. Al. G. Barnes, 41 Cal. App. 776, quoted in *Heath v. Faruzier*, 50 Cal. App. (2d) 598.

(We have endeavored to segregate the various points presented, but as they seem to be quite interlaced, it is almost impossible to distinguish where one is sharply distinct from the other.)

Based upon the testimony here given, and the law we consider applicable, we believe the judgment of the learned trial judge should be reversed.

Respectfully submitted,

WALTER GOULD LINCOLN,

Attorney for Appellant.

No. 10783

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ELMER MATEAS,

18
Appellant,

vs.

FRED HARVEY, a corporation,

Appellee.

BRIEF OF APPELLEE FRED HARVEY,
A CORPORATION.

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PAUL P. O'BRIEN,

TOPICAL INDEX.

	PAGE
I.	
Pleadings and record.....	1
II.	
Statement of facts.....	5
III.	
The law applicable to this case.....	8
IV.	
Failure on the part of appellant to establish the essential allegations of his amended complaint.....	12
1. That one Bob Ennis, an employee of appellee, acted as guide for the party of which appellant was a member, and had the mules under his sole control, charge and management	13
2. That the occasion of the accident was the first time that this mule had ever been down the Bright Angel trail.....	14
3. That it was the first time the mule had been up or down the trail in 1942.....	14
4. That it was the first time the mule had carried any excursionist on his back.....	14
5. That the mule was not accustomed to carrying any person	14
6. That the appellee knew the mule not to be suitable, etc.....	14
V.	
There was no negligence or breach of warranty on the part of appellee	22
VI.	
Conclusion	26

TABLE OF AUTHORITIES CITED.

CASES.	PAGE
Champagne v. Hamburger & Son, 169 Cal. 683.....	21
Conn v. Hunsberger, 224 Pa. 154.....	10, 16
Dam v. Lake Aliso Riding School, 6 Cal. (2d) 395.....	8, 21
Fererira v. Silvey, 38 Cal. App. 346.....	10, 16
Ficken v. Jones, 28 Cal. 618.....	9
Hammond v. Melton, 42 Ill. App. 186.....	10
Heath v. Fruzier, 50 Cal. App. (2d) 598.....	9
Kersten v. Young, 32 Cal. App. (2d) 1.....	9
Nicholson v. Porter, 118 Cal. App. 555.....	21
North American etc. Insurance Company v. Pitts, 104 So. 21.....	19
Parker v. Manchester Hotel, 29 Cal. App. (2d) 446.....	21
Roberts v. Griffith, 100 Cal. App. 456.....	10
Sinan v. A., T. & S. F., 103 Cal. App. 703.....	21

TEXTBOOKS.

13 Corpus Juris Secundum, Sec. 530, p. 1036.....	17
13 Corpus Juris Secundum, Sec. 534, p. 1040.....	18
13 Corpus Juris Secundum, Sec. 676, p. 1253.....	20
13 Corpus Juris Secundum, Sec. 678	21
13 Corpus Juris Secundum, Sec. 697	21

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All references are to pages of the transcript of record.

I.

Pleadings and Record.

The amended complaint alleges in substance [16-20] that the appellee, a New Jersey corporation, maintained a resort on the south rim of the Grand Canyon in Arizona; that it maintained two trails from said rim to its base, known respectively as the Phantom Ranch and Bright Angel trails; that it also maintained mules for the purpose of carrying passengers on the Bright Angel trail; that appellant bought and paid for a ticket for this excursion down the Bright Angel trail, informing the appellee at that time that he had never ridden a mule, was

inexperienced with either mules or horses, and that he desired a suitable, safe and fit animal; that appellant, on or about June 27, 1942, started on the excursion on mule back as a member of a party of seven, presided over and guided by one Bob Ennis, an employee of the appellee; that appellant was assigned to a mule known as "Chiggers," with the position of last in the line of mules; that appellant did not know the previous history of that mule.

All of these allegations are admitted by appellee.

The amended complaint further alleges [19-20] that this was the first time this mule "Chiggers" had ever been up or down the Bright Angel trail before or during 1942; that it was the first time the mule had carried any excursionist on his back; that for a period of approximately two years previously this mule had only carried a pack or merchandise; that the mule was not accustomed to carrying persons; that these facts were well known to the appellee and that the appellee should have known that the said mule was not at all suitable, or fit to be used for the purpose for which it was provided, and was not a safe mule to be ridden in such place under such circumstances and conditions, and by a person wholly unfamiliar with riding either horse or mule.

All of these allegations are denied by appellee.

The amended complaint then alleges [20-21] that when the party, including appellant, reached a place on the Bright Angel trail about five miles below its rim, the mule, without any act or thing done upon the part of the appellant, suddenly bucked and jumped and threw the appellant so that the appellant fell upon his back on the roadway.

Appellee admitted in its answer that the appellant fell from the mule, but denied for lack of information and belief the remainder of these allegations [24-25].

The rest of the amended complaint [21-22] alleged appellant's injuries or damages, which were denied by appellee for want of information or belief [25].

The appellee pleaded as affirmative defenses that the accident referred to was inevitable and unavoidable in so far as it was concerned, and that the appellant had voluntarily assumed any risk incident to riding the mule.

On page 2 of his opening brief, appellant states that at the close of his case appellee made the following motion:

“We move for a non-suit and make a motion to dismiss this action, no proof of any breach of any warranty that the mule was of a not fit and proper character * * *.”

Then, on page 3, appellant apparently contends that the motion was not sufficient in form because it did not sufficiently specify the grounds thereof, nor state the particular ground upon which it was based.

Even this short quotation from appellee's motion clearly does specify the grounds of the motion and the particulars upon which it was based. However, the said quotation consists only of the opening sentence of appellee's motion. The entire motion very clearly sets forth the particular grounds upon which the motion was based. We, therefore, quote it in full [134-135]:

“Mr. Schell: We move for a non-suit and make a motion to dismiss this action, no proof of any breach of any warranty that the mule was of a not

fit and proper character. In other words, there is no evidence here showing either negligence or any breach of warranty on which a possible recovery could be had; and we submit that all of the testimony shows, and that all the testimony does show, is that on this particular ride the mule bucked when he—after he had been out four or five hours, and he bucks and the plaintiff fell off, and that is the sum total of anything and is certainly no proof of any breach of warranty, or negligence, or failure to comply with the statute; and, furthermore, the allegations in the complaint are that this mule had never been ridden before and this was his first trip; he had always been used as a pack mule for times before, and plaintiff's affirmative proof shows the mule had been ridden by the so-called 'dude' for at least two years prior to the happening of this accident.

The Court: All right. Mr. Lincoln, you want—

Mr. Lincoln: Under Your Honor's ruling I have no answer to that. I think if there is any question as to the proof, however, we should be permitted to amend to conform to the proof, in that it makes no particular difference perhaps in the final analysis; any slight question as to whether the mule had been ridden this year, or whether for the first time, or whether it had been ridden this year on this trip for the first time, I don't know that it makes any difference in so far as our proof or plaintiff's is concerned."

No amendment to conform to proof, or otherwise was ever presented by appellant.

II.

Statement of Facts.

Appellant's statement of the case is not quite accurate where he states, on page 5 of his brief:

"Bob Ennis was the guide, a boy about 18 years old. He had been accustomed to horses since he was three—so his father said."

Actually his father testified that he took Bob into the Canyon when he was three years old, put him on a *mule*; that he looked back and said, "Dad, I am your guide," and that he had been riding ever since and had been handling *mules* or horses ever since [44].

On page 7 of his brief, appellant quotes from page 79 of the transcript as follows:

"And we were just rounding, going through a little dip and into a bend, and the mules were *struggling*, like they are inclined to do, and Bob, our guide, told us to close up the mules, and he stopped at the head to let the mules close up;" (Italics ours.)

That the word the witness actually used was *stragglings* is perfectly obvious from the context [79].

In addition to the facts set forth by appellant, we would call the Court's attention to the following additional, uncontradicted evidence in the case.

The witness Emmet Ennis, called as such on behalf of the appellant, testified that there were three trails, known respectively as the Bright Angel, the Kaibab and Yankee trails [38]; that he was in charge of all transportation, including transportation by mules; that when mules were purchased they were first put on a pack train and broken to a halter. They started with just a light saddle on them,

maybe a couple of canteens of water. Additional burdens were put on until the mules could handle a load and learn the trail. Then the packer rode them part of the way back up the trail, changing his saddle from one mule to another so that they become broken to being ridden. The bulk but not all of this training took place on the Kaibib trail [47-48]. The period of training varied from one to two years according to the different dispositions of the mules, and the disposition was generally determined by the packer in conjunction with the trail foreman [41]. When the trail foreman and the packer thought the mules are gentle enough they are brought into buildings, or barns, at the heads of the trails. Guides are put on them and they are ridden for a certain length of time until the guides determine that mules are safe for "dudes" to ride. All persons riding the mules other than the packers or guides are termed "dudes" [43-48].

Before starting on a trip, the trail foreman and the guides size the people up as to their weight, and then assign them to a mule according to that weight, because they know what weight a mule can handle. The weight a mule can handle does not necessarily depend on the size of the mule [44-45].

The particular mule in question, "Chigger," was in the pack train in 1938 and 1939, being used as a guide mule and occasionally ridden by the packer. In 1940 he went into the "dude" string on the Bright Angel trail [126-127].

Witness John Bradley, also called on behalf of the appellant, corroborated the testimony of witness Ennis that for the first year or so "Chigger" was used on the pack trains, began its "dude" training in 1940, and

continued on "dude" trains from 1940 up to June, 1942 [128-129].

The appellant and his wife testified that it took about two to three hours to reach Indian Gardens from the start of the trip at the rim; that the entire party dismounted and had lunch; that the accident occurred from about one-half to one hour after the party left Indian Gardens [57-102].

With regard to the conduct of the mule on the way down the trail, the plaintiff testified [58]:

"Well, just by walking along like the rest he would suddenly try to squeeze through the other mules and get away over the line, away from the end of the line, try and squeeze up through the trail, get out in front,"

and that he did this on more than one occasion.

The plaintiff's wife in this regard testified [78] that on the way down a number of times the mule tried to squeeze past the rest of the party, doing so on the drop side of the Canyon.

Both the appellant and his wife testified that the mule did not buck at all before arriving at Indian Gardens [58, 78]. In fact there is no testimony whatsoever that the mule bucked at any time until the actual occasion when the appellant was thrown off.

The trail foreman, John Bradley, called as a witness for the appellant, testified that he was trail foreman, that he knew the mule "Chigger," and that he had never received a report before this accident that the mule had bucked [127, 128-130].

III.

The Law Applicable to This Case.

Appellant himself clearly states the law applicable to this case when he says, on page 12 of his brief, as follows:

“In the ordinary contract of hiring of a horse or mule to be used to ride, the owner of the animal warrants

‘against defects or vicious habits which he knows, or by the exercise of proper care could know; and if he fails to exercise such care and it occasions injury to his customer he will not be relieved of liability, though he did not actually know the horse was unsuitable for the purpose * * *.’

Dam v. Lake, 6 Cal. 395, page 400;

Kersten v. Young, 32 Cal. App. (2d) 1, page 6.”

In addition to the above quotation from *Dam v. Lake Aliso Riding School*, 6 Cal. (2d) 395 (erroneously referred to as 6 Cal. in appellant’s brief) we would call the Court’s attention to the further wording of the Court on page 400:

“ ‘In the case at bar, therefore, the questions were whether the mare was vicious and unsuitable for the purpose for which she was hired, and whether the defendant knew, or by the exercise of reasonable care should have known, the fact. The burden of establishing both propositions was on the plaintiff.’

We are of the opinion that the foregoing statement by the Supreme Court of Pennsylvania in the Conn case exhibits the reasonable rule which should be approved and applied here. Under this rule the so-called implied warranty is not a warranty in that

sense which insures the suitability of the horse, but is only a contractual obligation assumed against reckless or heedless hiring out of a horse without reasonable care to ascertain the habits of the animal with respect to its safety and suitability for the purpose for which it is hired."

In this quotation, in this connection, appellant also refers to the case of *Kersten v. Young*, which he cites as 32 Cal. App. (2d) 1, page 6. As there is no such case, we assume the reference is to *Kersten v. Young*, 52 Cal. App. (2d) 6, which affirms the rule in the *Dam v. Lake* case.

The same rule is again set forth by appellant, on page 14 of his brief, in the following quotation from *Heath v. Fruzier*, 50 Cal. App. (2d) 598, as follows:

" 'A well established general rule is that the owner of a dangerous or vicious animal who has knowledge that it is such an animal, is liable for any injuries it may inflict upon another, unless such other person voluntarily or consciously does something which brings the injury upon himself.' "

Again we might add to appellant's reference to this case by further quoting from page 600:

"The gist of the action is not the manner of keeping the vicious animal, but the keeping of him at all with knowledge of the vicious propensities."

Appellant cites *Ficken v. Jones*, 28 Cal. 618 (page 13 of the opening brief), which case involves injury done by cattle driven through the streets of a city. The case has no application to the one at bar. However, we might interrupt to point out that even in this case the Court holds that it was proper for the defendant to show in defense

that the persons in charge of the cattle were persons of competent skill in the business. This is interesting in view of the evidence introduced by appellant himself in the present case that the guide, Bob Ennis, had been accustomed to handling mules and horses since he was three years old.

The case of *Hammond v. Melton*, 42 Ill. App. 186 (page 13 of the opening brief) did not have the slightest bearing on the present case, unless it could be said, as a matter of law, that the known propensities of mules are such as to render them unfit for use in carrying persons. Of course exactly the reverse is true.

Appellant cites *Roberts v. Griffith*, 100 Cal. App. 456 (page 13 of the opening brief). This case merely holds that it is negligent to allow horses or mules to run at large and unattended on the streets of a municipality.

Appellant cites *Fererira v. Silvey*, 38 Cal. App. 346 (page 14 of the opening brief). This case involved a run away team of mules. The Court affirmed a judgment for the plaintiff because there was evidence that the defendant was thoroughly familiar with the vicious and dangerous nature of the particular mule and of its predilection for running away (page 350, 353).

Appellant then cites, page 14, the case of *Conn v. Hunsberger*, 224 Pa. 154. In this case a mare was harnessed to a light wagon and rented to the plaintiff. The plaintiff started to drive about the city. Within half an hour after the animal was hired it suddenly, without any apparent cause, started to kick violently and finally ran off. The animal kicked the dash board off, hit the plaintiff above the eye and kicked the seat from under the plaintiff. While the animal was running away, the

wagon violently struck a truck standing on the street and plaintiff was thrown out. *Plaintiff called expert witnesses to testify to the conduct of the mare on the occasion of the accident, showing that she was not mild, kind and gentle, but was wild and vicious, and that a gentle horse would not act as she did.*

In quoting from this case, appellant does not complete the quotation. We shall now do so, as follows:

“His warranty is against defects or vicious habits which he knows or by the exercise of proper care could know, and if he fails to exercise such care and it occasions injury to his customer, he will not be relieved of liability though he did not actually know the horse was unsuitable for the service.”

We have no quarrel with the authorities cited by appellant on page 15 of his brief, that knowledge of a servant is imputed to his master, but before any such imputation can take place there must have been such knowledge upon the part of that servant. The present case is devoid of any evidence that the rule in question had any dangerous propensities. Naturally, therefore, it is devoid of any evidence that any employee of the appellee knew of any such dangerous characteristics. The question of imputation of such knowledge therefore becomes entirely mute.

The law is clear in that before appellant could recover in this case the evidence would have to show

1. That the mule was in fact unfit for the purpose for which it was being employed, and
2. That the appellee had, or in the exercise of reasonable care, should have had knowledge of such fact.

As the record is completely devoid of any evidence in support of either of these propositions, the trial court was required to grant appellee's motion to dismiss, and its action in so doing should be affirmed.

Failure on the Part of Appellant to Establish the Essential Allegations of His Amended Complaint.

The allegations of the amended complaint charging liability on the part of appellee are:

1. That one Bob Ennis, an employee of appellee, acted as guide for the party of which appellant was a member, and had the mules under his sole control, charge and management.
2. That the occasion of the accident was the first time that this mule had ever been down the Bright Angel trail [19].
3. That it was the first time the mule had been up or down the trail in 1942 [19].
4. That it was the first time the mule had carried any excursionist on his back [19].
5. That the mule was not accustomed to carrying any person [19].
6. That appellee knew that the mule was not suitable or fit to be used for the purpose for which it was provided, and was not a safe mule to be ridden in such place under such circumstances and conditions and by a person wholly unfamiliar with riding either horse or mule [20].

We will now consider each of these allegations in the above order:

1. That One Bob Ennis, an Employee of Appellee, Acted as Guide for the Party of Which Appellant Was a Member, and Had the Mules Under His Sole Control, Charge and Management.

The evidence shows that Bob Ennis was an employee of appellee, that he acted as a guide for this particular excursion and had general control, charge and management of the mules. It also shows that appellee's employees, including Ennis, designated the particular mules which each member of the party was to ride.

The evidence, however, negatives the *sole* control, charge and management of the mules by Ennis, since obviously their riders had a certain amount of control, charge and management of the mules being ridden by them.

It is true that the evidence shows that at the suggestion of a Mr. Boles he and the appellant exchanged mules; that after they had done so Ennis came back checking; that appellant then told him that he had changed mules because he could not handle the mule he was on, but that Mr. Boles could handle any mule; that Ennis told them to return to their original mules and that they did so. Neither appellant nor any other witness testified as to any objection or protest being made by appellant to the making of this change back. Apparently both appellant and Mr. Boles acquiesced quite willingly to this change back to their original mules.

There is not a vestige of evidence that Ennis was not a fully competent person to act as such guide. The only evidence on the point was that he had been accustomed to handling mules and horses since he was three years old [45].

2. **That the Occasion of the Accident Was the First Time That This Mule Had Ever Been Down the Bright Angel Trail.**

The evidence is directly to the contrary. Not only was there the testimony of the training given to the mules used for carrying persons, but there was direct testimony with regard to this particular mule, namely, that he had been on the Bright Angel Trail since 1940 [126-127.]

3. **That It Was the First Time the Mule Had Been Up Or Down the Trail in 1942.**

The evidence did show this to be the fact. However, the evidence also showed that for the two preceding years the mule had been regularly assigned to this particular trail. There is no evidence whatsoever that, with this experience behind him, his first trip in any manner entailed the slightest danger to his rider, or was the slightest degree more dangerous than any later trip.

4. **That It Was the First Time the Mule Had Carried Any Excursionist On His Back, and**
5. **That the Mule was Not Accustomed to Carrying Any Person.**

The evidence is directly to the contrary, namely, that since 1940 the mule had been on the "dude" string [127.]

6. **That the Appellee Knew the Mule Not to Be Suitable, etc.**

This is not a direct allegation that the mule was unsuitable for the purpose for which it was provided, or was not a safe mule to be ridden under such circumstances, and the amended complaint contains no direct allegation.

There is no evidence whatsoever that the mule was not a suitable or safe animal. There is no evidence that even if the mule had not been safe or suitable, that appellee had knowledge thereof. Once again, such evidence as there is on the point is to the contrary [41, 44-45, 47-48, 58, 78, 126-130.]

Thus of the allegations charging liability on the part of the appellee, the only ones established by the evidence are that Bob Ennis was the guide in charge of the party, and that this was the mule's first trip for that year on this particular trail.

We submit that it needs no argument to demonstrate that this proof is utterly insufficient to establish liability on the part of the appellee on any theory, either that of negligence or of breach of any warranty.

On the other hand, the evidence did affirmatively establish the exercise of a high degree of care on the part of appellee in the training of its mules. It will be remembered that for a year or two, according to the temperament of the particular mule, it was used as a pack train mule, during which time it was broken to a rider by being actually ridden by the packers; that it was then ridden by the guides until the guides determined that the mules were safe for "dudes" to ride, and that they were not put into "dude" strings until their suitability therefor had been determined by the trail foreman, the packers and the guides.

Not only had the particular mule involved in this case been given this training, but it had actually been used for two years to carry "dudes."

In view of this evidence, the following quotation from page 13 of appellant's brief, taken from the case of *Fererira v. Silvey*, 38 Cal. App. 346, 352, is very appropriate:

“ ‘Common experience justified the observation that the average work horse or mule, having been thoroughly “broken” to harness and the ordinary burdens cast upon horses, is so gentle in his relations with those using him for the purpose to which he has been educated—that is, is so bereft of nervousness and of an inclination to become nervous, that the mere blowing of a bag of paper in front of him or near him would have no effect upon him.’ ”

Appellant claims that the conduct of the mule on the particular trip was such that it informed appellee's servants that it was an unsuitable animal. What was that conduct? As far as the evidence goes, the conduct of the mule was exemplary except that on several occasions it tried to get ahead of some of the other mules. Apparently appellant was able to hold the mule in place. Certainly the mule did not buck. What is there in this conduct that would have indicated that thereafter the mule would start to buck?

If it is a fact that a tendency to push ahead in a line of mules indicates a tendency to buck, then appellant could have called an expert to so testify, as was done in the *Conn* case (*Conn v. Hunsberger*, 224 P. 154). Appellant did not do so. The burden of proof was on appellant. In the absence of any such evidence, it must be assumed that the desire of the mule to get up front and his subsequent bucking have no connection whatsoever, and that the former was in nowise indicative of the likelihood of the latter. This is especially true as there is no evidence that

the only bucking done by the mule, namely, the bucking which caused the appellant's fall, occurred while the mule was attempting to pass any other animal.

Moreover, if it could be said (which, of course, it cannot) that the tendency to get ahead renders a mule vicious, and that is so well known that no evidence thereof is necessary, then the fact must also have been known to appellant, and that by consenting to remain on the mule, at least after the stop at Indian Gardens, appellant would have assumed the risk of any injury thereafter occurring to him by reason of such peculiarities.

Appellant claims, on page 17 of his brief, that appellee was a common carrier. There are many answers to this contention. The most essential element to the creation of that relationship is the holding out by the carrier of its willingness to carry any and all persons who present themselves to it for carriage, provided said persons paid the proper fare to be charged (13 *Corpus Juris Secundum, Carriers*, Sec. 530, p. 1036). There is not the slightest evidence in this case that appellee made any such holding out. There is not the slightest evidence that appellee did not reserve to itself the right to refuse to make the trip at all for any reason whatsoever. Certainly there is nothing in the evidence to show that when appellant applied for tickets for the excursion he would have had a cause of action against appellee, had the latter arbitrarily informed him that it had cancelled the excursion. Yet, had appellee been a common carrier, it would have been obliged to make the excursion in the absence of a suitable excuse. Certainly there is nothing in the evidence to show that appellant would have had a right of action against appellee had the latter arbitrarily informed the appellant that it had so reduced the number of persons it was accommo-

dating on the trip that there was no space available for appellant. Yet a common carrier, in the absence of a valid reason, may not reduce its accustomed service. Again, appellant would have had no right of action against appellee had the latter informed appellant that a sufficient number of persons had not signified their intention of joining the excursion, and, consequently, that it would not take place. Had appellee been a common carrier, it would have been obliged to make the excursion even had appellant been the only person desiring to make the trip.

In fact, there is nothing in the evidence to show that appellant would have had a cause of action against appellee had the latter arbitrarily and without any reason refused to allow the appellant to become a member of the excursion. Were appellee a common carrier, it would have had no such right arbitrarily to refuse transportation to appellant.

The evidence in this case merely shows a typical example of a livery stable proprietor who arranges conducted excursions for his patrons. Operators of livery stables are universally held not to be engaged in the business of a common carrier.

Thus it is said in 13 *Corpus Juris Secundum, Carriers*, Section 534, page 1040:

“A livery stable keeper does not hold himself out to serve any and all persons, but operates only under a special contract, and deals with such persons only as he chooses, and is in no respect a common carrier; and the fact that he rents his vehicles with horses does not of itself make him a common carrier of passengers within the legal meaning of the term.”

In *North American etc. Insurance Company v. Pitts* (Ala.), 104 So. 21, it was held that an airplane operated by an owner at a summer resort making a prescribed trip for a specified sum did not render the operator a common carrier. The analogy to the case at bar is complete.

Again, another reason exists why appellant, or those engaged in a like business, are not common carriers. In the case of common carriage, the carrier merely supplies a seat or space in a vehicle, over the operation of which the passenger has no control whatsoever. This is the element which justifies the strict rule of liability imposed on common carriers. Where there is no such regulation of sole control, the reason for the common carrier rule of liability ceases.

The difference between the situation where one rents to another a vehicle, animal or instrumentality to enable the other to make a trip, or otherwise further his business or pleasure, and that of a common carrier who merely furnishes space in or on one of its vehicles is quite obvious. If the mere renting of the means of getting some place constitutes common carriage, then every bicycle store which rents bicycles by the hour is a common carrier. In fact, if the ownership and renting of an instrumentality, even accompanied by a certain amount of supervision, constitutes common carriage, then every roller or ice skating rink is a common carrier. They rent instrumentalities of carriage, they establish the direction of travel, they have many regulations as to the use of the skates and method of skating, and they always have attendants on the floor in general supervision of the skating.

Unquestionably, both under reason and the authorities, one is not a common carrier who, instead of merely renting space in a vehicle entirely controlled by it, rents that

vehicle, or an animal, or other instrumentality, to a person for use by that person.

Therefore, both because of the absence of any evidence that appellee held itself out to carry all persons, and because of the very nature of the renting done by appellee, it cannot be held to be a common carrier.

Appellant next contends that appellee, being a common carrier, was an insurer of the safety of appellant. As we have previously shown, appellee in fact was not a common carrier, but, even if it were, still it would not be an insurer of appellant's safety, and before recovery could be had against appellee the evidence would have to establish some negligence or breach of warranty upon its part: That even a common carrier is not an insurer against accidents to its passengers is a universally and elementary rule. In this connection, we would refer the Court to the following general statement of that rule, found in 13 *Corpus Juris Secundum, Carriers*, Section 676, page 1253:

“The general rule, as stated in *Corpus Juris*, which has been approved, is that a carrier of passengers is not as absolutely liable for the safety of the passengers as a carrier of goods is for the safety of the goods; but is liable only for injury to passengers which are caused by its negligence in failing to exercise the proper degree of care, skill and diligence for such passengers' safety. A carrier is not an insurer of the safety of passengers in the sense in which a carrier of goods is said to be an insurer of the safety of the goods, as stated in *supra*, Section 71, and hence is not liable for injuries caused by an accident which in the exercise of the proper degree of care, skill and diligence could not be anticipated or prevented, as stated in *infra*, Sections 678, 697.”

Section 678, referred to, is as follows :

“A common carrier of passengers should exercise such a degree of care, skill and diligence for the safety of passengers as is required by the nature and reference of the undertaking in view of the mode of conveyance and other circumstances involved.”

Section 697 deals with an act of God.

See also such cases as the following, which hold that even a common carrier is not an insurer of the safety of its passengers :

Nicholson v. Porter, 118 Cal. App. 555, 557;

Sinan v. A., T. & S. F., 103 Cal. App. 703, 708;

Parker v. Manchester Hotel, 29 Cal. App. (2d) 446, 454;

Champagne v. Hamburger & Son, 169 Cal. 683, 690.

Finally, we would again cite to this Court the case of *Dam v. Lake Aliso Riding School*, 6 Cal. (2d) 395, cited by appellant as setting forth the rules governing this case, and wherein the Court says, page 400 :

“It is true a livery man is not an insurer of the suitability of a horse or carriage let to a customer, but he is bound to exercise the care of a reasonably prudent man to furnish a horse or carriage that is fit and suitable for the purpose contemplated in the hiring.”

V.

There Was No Negligence or Breach of Warranty on the Part of Appellee.

Appellant says, page 8 of his opening brief, that this Court will take judicial notice of the following facts: That a horse is not a mule; that the two animals, being bred differently, have not the same peculiarities of temperament any more than does an American as contrasted with a Japanese; and that a horse, or mule, which has been in pasture all winter until the middle of June has more vim, vigor and vitality than a similar animal which has been working during the same period.

Appellant contends that these facts were well known to appellee but *were not and could not have been known to appellant*. Ignorant though appellant may have been of mules, we are inclined to doubt his ignorance as to these particular matters.

We readily concede that a mule is not a horse, and that the two animals have not the same peculiarities of temperament. We, however, fail to see where this leads us.

Again, granting that either a horse or a mule just taken in from pasture may have more "vim, vigor and vitality" than had he been working, this does not show that he, therefore, possesses so much "vim, vigor and vitality" as to render him dangerous to ride.

Moreover, appellant does not seem to draw any conclusion from the above differences between horses and mules, apparently known to everyone except himself, unless it be that he would infer that a mule is *per se* an improper animal to be ridden unless he has been somewhat exhausted by a long period of hard work. We do not believe such to be either the fact or the law.

Appellant then continues, on page 8 of his brief, that the rule of law applicable to livery stable keepers and riding academies is to some degree applicable to the present case, but that the circumstances are radically different.

Unfortunately appellant does not point out the degree to which these cases are applicable, or more particularly, the degree to which they are inapplicable. We submit that these cases are directly and fully applicable to the present case and, in fact, are controlling herein.

Appellant then says, pages 8-9 of the opening brief, that when a livery stable rents a horse it places that animal immediately and conclusively beyond its control, although in such cases the drive would take place upon a level road or highway, that in the riding academy cases the animal is ridden upon a level highway or road, is subject to the control and peculiarities of the rider, and that the "riding academy guide or teacher," if there is one, has no control over the animal.

Of course there is no evidence dealing with any of these matters. We do not believe that when one rents a horse for a ride he always remains on a level road or highway. The personal experience of the writer of this brief is directly to the contrary.

Again we fail to see why a "riding academy guide or teacher" should have less control over the horses ridden by his party or his pupils than had Ennis over the mules in the present case. We submit that it is not unusual for a "riding academy guide or teacher" to place himself in the lead of a party going on an excursion on horseback in mountainous country.

Appellant then says, on page 9 of his brief, that conditions also differ in that he called the attention of appellee to the fact that he had never ridden before; that the par-

ticular mule was selected by an employee of appellee, and that the trip was not upon a public highway by a wide, smooth, well traveled roadway, but down a steep incline following the contours of a cliff and only four to six feet wide.

Again it seems to us that exactly these conditions, except the steep incline following the contours of a cliff, are extremely normal in cases where horses rather than mules are rented.

Since the Court is asked by appellant to take judicial notice of the characteristics of horses and mules, we assume it will also take judicial notice that a mule is a much more sure-footed animal than a horse, and is much safer to use on these steep inclines.

While we fail to see the analogy between the dog bite cases and the case at bar, it must be remembered that *in the absence of contrary statutory enactment* the rule still is that "every dog is entitled to his first bite." If there is an analogy, then it must be that "every mule is entitled to his first buck."

If we read appellant's brief correctly, starting with page 10 thereof, appellant admits that there is no evidence whatsoever showing "any vicious, improper or incorrect mannerisms of this particular mule before he was mounted by appellant.

However, appellant does claim that between the time he mounted the mule and the accident, the mule did display such traits.

The only evidence in the record with regard to the conduct of the mule on the trip is that of the appellant and his wife. Appellant testified that the mule did not buck at all before he reached Indian Gardens [58-78]. His

wife testified that she did not see the mule buck at all preceding the accident [58].

Both appellant and his wife testified that on more than one occasion while *walking along like the rest of the mules*, this particular mule would suddenly try to squeeze through the other mules and get out in front [58, 78]. Apparently appellant was successful each time in restraining the mule, as there is no evidence that the mule was successful in passing any of the other animals.

Likewise there was no evidence that the mule bucked during any of these attempts to get out of line. Likewise there is no testimony that when the mule did buck he was endeavoring to get out of his place in the line.

There is therefore no evidence in the case showing that the inclination of the mule on this particular time to get out of his proper place in line had anything to do with his subsequent bucking or with the accident to appellant.

We submit that this tendency on the part of the mule to try and get ahead of some of the other mules is far from sufficient to establish that the mule was vicious, unsafe to ride or an improper animal to entrust to even an as inexperienced a rider as appellant claims to have been.

It is true that appellant, on pages 10 and 11 of his brief, draws a rather terrible picture of the dangers to which appellant was exposed because in so trying to pass the other mules he might have been precipitated over the cliff, saying that the "intense desire of the mule was almost to compel the rider to commit suicide." This argument might be of more than academic interest had the mule actually been precipitated over the cliff, or had he, in bucking appellant off, thrown him over the cliff. Fortunately no such occurrence took place. Consequently, we fail to see what application this particular argument, even if well taken, would have to the case at bar.

VI.

Conclusion.

We submit that the whole evidence in this case shows without contradiction that a mule, which had received two years of training and then had acted as a carrier of "dudes" for another two years, suddenly started to buck and threw appellant off. We submit that there is not the slightest vestige of evidence that on any previous occasion the mule had shown any viciousness or unsuitableness for the purposes for which it was being used, namely, the carrying of excursionists up and down the trail.

We submit that the evidence completely fails to show that in fact the mule was vicious, or unsafe, or unsuitable for the purpose of carrying excursionists up and down the trail, and that consequently it utterly fails to establish any breach of warranty or negligence on the part of appellee. On the contrary such evidence as is to be found in the record affirmatively shows the use of due diligence by appellee, that the mule was entirely fitted for the purpose for which it was being used and had not previously evidenced any improper tendencies.

We, therefore, respectfully submit that the evidence in this case being such as to be insufficient to have supported a judgment in favor of the appellant, either on the theory of a breach of warranty or of negligence upon the part of appellee, the trial court was not only justified but was compelled to grant appellee's motion to dismiss, and that the judgment rendered in this case in favor of appellee should be affirmed.

Respectfully submitted,

SCHELL & DELAMER,

Attorneys for Defendant and Appellee.

No. 10783

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

ELMER H. MATEAS,

Appellant,

vs.

FRED HARVEY, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

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FILED

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A mule need not have a bad reputation during past years, in order for its owner to be liable for the incorrect actions of that same mule—provided, of course, these actions are brought to the attention of the owner (or his agent), before the actual injury happens.

The guide, Bob Ennis, had been familiar with the mules on the Bright Angel trail since he was three years old—or for 15 years. He was mule wise. He must have known that the restiveness of the mule “Chiggers”, when it was trying to force itself in front of the other mules (whether “straggling” or “struggling” doesn’t make much difference, for the logic of it) would lead to other notions, and motions, of this same rule. He DID KNOW APPELLANT was a wholly inexperienced rider, and one whom it was his duty to protect to the utmost.

He DID know Appellant was trying to protect himself by taking another mule, which was a safe one. Ennis DID know—or should have known—that it was unsafe to compel Appellant to resume his ride on the same mule under these circumstances.

Ennis was the boss of the outfit. He was the guide, the leader. He was the one person responsible for the safety of those under his charge. He was the representative of Appellee.

He required Appellant to remain on the same mule. What else could Appellant do? What did he know about mules? Wasn't it incumbent upon him to believe in and rely upon the supposed knowledge of the guide? Who else was there to give him mule knowledge, or to provide for his safety? On whom else was he to rely if not on the guide—in whose care he had been placed?

Of all the thousands of inexperienced riders handled by Appellee, should Appellant consider he was receiving any less degree of protection—that he, of all the thousands, was the only one to be placed in jeopardy?

Prithee, what would Appellee have Appellant do under such circumstances? Should he refuse to go on, and sit by the trail-side, like a pouting boy? Should he wait until someone came down or up, to take him down, or up, on some other conveyance? Explaining to them that he, Appellant—totally inexperienced knew, or thought he knew more about mules than Appellee's representative—the guide, and Appellant demanded another conveyance. Evi-

dently there wasn't any other conveyance, as his "hospital ship" was the rolling back of another mule.

He wouldn't be allowed to ride any other mule!

What was he to do? He must either walk back, or sit still, or continue as he was told to do. Hadn't he a right to trust the wisdom of the guide? Shouldn't he believe the guide knew his mules; knew them to be safe: and appellee knew their employee, and knew him to be a safe person in whose charge to place inexperienced riders, year after year? In spite of the already developed peculiarity of this particular mule, shouldn't Appellant still trust in the guide's implied promise of safety? Shouldn't he comply with the guide's orders? Either amounted to the same result—the injury.

How can Appellee say it did not hold itself out to the world as an insurer of the safety of those excursionists?

When I am afraid of an animal, and have been placed in peril by its actions, and the man in charge of it tells me that I MUST ride that particular beast—how can he say he is not responsible for the result which came from his defective knowledge of the beast, or from his lack of care?

One should not be permitted to escape responsibility when he compels me to enter upon a course of conduct which is dangerous, and which he knows, or should know, is dangerous to me, and which but a moment before showed signs of danger.

The actions of this particular mule during the excursion trip going down, were brought especially to the attention of Appellee, by Appellant. From that moment, Appellee became responsible for whatever injury flowed from the actions of this mule.

Even if this should not be sufficient, then Appellee impliedly guaranteed the absolute safety of Appellant, by reason of the advertisement in which Appellant stated that thousands of inexperienced riders had ridden these mules, along these trails, in perfect safety.

We submit:

The judgment should be reversed, and Appellee required to put in its proof, if any it has.

Respectfully submitted,

WALTER GOULD LINCOLN,
Attorney for Appellant.







